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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-703

UNITED STATES OF AMERICA,

Appellant,

v.

FIRST NATIONAL BANCORPORATION, INC. and THE FIRST NATIONAL BANK OF GREELEY,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR APPELLEES

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INDEX

Page

A. Statement of the Case 1

Banking in Colorado 3

B. Summary of Argument 5

I. Horizontal Case 5

II. Vertical Case 14

C. Argument 21

I. Theoretical Underpinnings of a Public Policy to Protect Competition 21

II. Potential Competition 23

A. Bancorporation Has No "Presence" in Greeley 24

i. Mortgage Servicing Office 25

ii. Solicitation of Greeley Merchants 25

iii. Weld County Borrowers from First National Bank of Denver 26

B. Over-Concentration 27

i. What is "Concentration"? 27

ii. The Relevant Market Share of Bancorporation Is Significantly Overstated By Use of Gross Deposit Data 38

C. Bancorporation Is Not a Potential Entrant into Greeley 40

i. The Qualifications Necessary to Support a New Charter in Greeley Are Shared by Many in Colorado 46

ii. Legal Precedents on Probability 50

iii. Capacity to Enter 58

iv. The City of Greeley Is Not an Oligopolistic Banking Market 63
v. Time Frames for Entry 65
D. "Triggering" 66
E. Potential Competition Summarized 67
III. Beneficial Competitive Effects 68
A. Bancorporation Will Help FNB Greeley to Become a More Competitive Bank 68
B. Bancorporation Is Itself an Effective Competitor 71
C. Competition Among Denver-Based Banks Is Intense–Competition Among Local Banks in Smaller Colorado Cities Is Not 72
D. Statewide "Concentration" Is Not Incompatible with Effective *Market* Competitiveness 74
IV. Section of the Country 78
V. Line of Commerce 82
VI. Appellant's Vertical Case 84
A. Appropriate Geographic and Product Markets 85
B. Competitive Impact 90
CONCLUSION 92
APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Allis-Chalmers Mfg. Co. v. White Consolidated Industries 414 F.2d 506 (3rd Cir. 1969) 37, 55
American Tobacco Co. v. United States, 328 U.S. 781 (1946) 55

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 9, 28, 50

Commissioner v. Duberstein, 363 U.S. 278 (1960) 43

Ecko Products Co. v. Federal Trade Commission, 347 F.2d 745 (7 Cir. 1965) 36

Federal Trade Commission v. Procter & Gamble Co., 386 U.S. 568 (1967) 10, 37, 41, 47, 55

Ford Motor Co. v. United States, 31 L.Ed. 2d 492 (1972) 9

General Foods Corp. v. Federal Trade Commission, 386 F.2d 936 (3 Cir. 1967) 37, 55

Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961) 81

United States v. Atlantic Richfield Co., 297 F. Supp. 1961 (S.D.N.Y. 1969) 55

United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958) 81

United States v. Continental Can Co., 378 U.S. 441 (1964) 36

United States v. Crocker-Anglo National Bank, 223 F. Supp. 849 (N.D. Calif. 1963) (Opinion on Motion for Preliminary Injunction) 53

United States v. Crocker-Anglo National Bank, 277 F. Supp. 133 (N.D. Calif. 1967) (Opinion on Merits) 48, 65, 83

United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) 10, 47, 54

United States v. Falstaff Brewing Corp., Docket 71-783 (probable jurisdiction noted, Feb. 28, 1972) 7, 44

United States v. First National Bancorporation, Inc., complaint filed December 2, 1970, Civ. No. c-2754, D. Colo. (Sterling Case) 78

United States v. First National Bancorporation, Inc., complaint filed April 28, 1971, Civ. No. C-3077, D. Colo. (Colorado Springs Case) 77

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United States v. Idaho First National Bank, 315 F. Supp. 261 (D. Idaho 1970) 49, 65, 83

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United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (S.D.N.Y. 1965) 38

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United States v. Philadelphia National Bank, 374 U.S. 321 (1963) . . . . . *passim*

United States v. Phillipsburg National Bank and Trust Co., 399 U.S. 350 (1970) 12, 74, 79, 83

United States v. Provident National Bank, 280 F. Supp. 1 (E.D. Pa. 1968) 83

United States v. Standard Oil Co., (N.J.), 253 F. Supp. 196 (D.N.J. 1966) 37, 55

United States v. Third National Bank in Nashville, 390 U.S. 171 (1968) 87

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 43

United States v. Von's Grocery Co., 384 U.S. 270 (1966) 33

United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968) 55

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In re Application for Charter of Weld County Bank, Findings of Fact, Order Granting Application, Banking Board of the State of Colorado, May 24, 1972 (slip copy) 4

In re Beatrice Foods Co., Docket 6653, 67 F.T.C. 697 (1965) 51

In re First & Merchants Corporation, Richmond, Virginia, 1971 Fed. Res. Bull. 691 6

In re First Bank Stock Corporation, Order Denying Application, 1960 Fed. Res. Bull. 486 20

In re The First National Bancorporation (The Exchange National Bank of Colorado Springs), 1971 Fed. Res. Bull. 345 14

In re The First National Bancorporation (The National State Bank of Boulder), 1971 Fed. Res. Bull. 613 78

National Bank of Westchester, et al., Disapproval of Application to Merge, 1963 Annual Report of the Comptroller of the Currency 138 19

Statutes:

The Bank Merger Act of 1966, 12 U.S.C. 1828(c), 80 Stat. 7 . . . . . 35, 66

Clayton Act, Section 7, 15 U.S.C. 18, 38 Stat. 731, as amended ..... *passim*

14 Colo. Rev. Stat. 14-3-1 3

1960 Laws of Va., c. 62, as amended, 1950 Code of Va. (1966 Repl. Vol.) §6.1-230 6

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Census of Population, 1970, U.S. Department of Commerce 5, 6

Changes Among Operating Banks and Branches–1971, Federal Deposit Insurance Corporation 27

Defendant's Opening Memorandum in Support of Motion for Judgment on the Record, Washington Mutual Savings Bank, et al. v. Federal Deposit Insurance Corporation, No. 45-71C3, W.D. Wash. 20

Denver Post, March 26, 1972 13

Denver Post, May 2, 1972 4

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Moody's Bank & Finance Manual, 1972 86

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1960 Annual Report, Federal Deposit Insurance Corporation 27

95 Cong. Rec. 11484-11507, 81st Cong., 1st Sess. (1949) 36

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FIRST NATIONAL BANCORPORATION, INC. and THE FIRST NATIONAL BANK OF GREELEY,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

On October 18, 1968, The First National Bancorporation, Inc., Denver, Colorado, (hereinafter "Bancorporation") was established as a holding company for The First National Bank of Denver ("FNB Denver") and three retail, suburban Denver banks it had organized as affiliates.[1] At June 30, 1970, these four banks had

[1] The First National Bank of Northglenn, The First National Bank of Bear Valley, and The First National Bank of Southglenn.

deposits of $495.7 million, or 12.9% of total deposits of all commercial banking offices in Colorado (App. 1144). However, Denver is a regional center for a number of states, and FNB Denver is a regional bank, serving large commercial accounts throughout the region.[2] Bancorporation's share of total accounts and dollars of deposit in small accounts ($0–$1,000) in Colorado is about 5% (App. 1688).

On November 5, 1969, Bancorporation applied to the Board of Governors of the Federal Reserve System ("the Board") for permission to acquire 80% or more of the capital stock of The First National Bank of Greeley ("FNB Greeley") which had deposits of $39.3 million on June 30, 1970. (App. 1155). Bancorporation had not previously tried to acquire any commercial banks. On June 9, 1970, the Board approved (App. 1713). Appellant instituted this action on July 8, 1970. By force of the filing, the acquisition was automatically enjoined. The complaint was amended by leave of the court on March 5, 1971. A plenary trial was held on May 3 through 6 and May 10 through 13, 1971. The trial court found for the defendants on July 12, 1971. Appellant moved to reopen the record and a hearing was held on August 9, 1971. After both sides had been fully heard and their evidence taken, the trial court denied the motion. Thereafter, Appellant prosecuted this appeal from the dismissal of its complaint.

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[2] This distinguishes the unit banking state from the large statewide branching chains where a string of retail offices enables the system to retain a similar proportion of both retail and wholesale customers.

BANKING IN COLORADO

Colorado is a unit banking state, that is, no bank may establish branches.[3] There are, however, no prohibitions against corporate ownership of more than one bank. Western Bancorporation ("Western") with systemwide deposits of $10 billion in 11 western states, is the largest commercial bank holding company (*Moody's Bank & Finance Manual*, 1971) doing business in Colorado, with Colorado deposits of $197.9 million on June 30, 1970 (329 F. Supp. at 1009).[4] This holding company is headquartered in California and is barred by federal law from increasing the number of its Colorado banking subsidiaries. United Banks of Colorado Inc. ("United") is the second largest commercial bank holding company doing business in Colorado. At the time of the trial of this case, it had 9 banks (8 acquired) with system deposits (all in Colorado) of $565.5 million (329 F. Supp. at 1009). Bancorporation was the third largest.

In 1961, when only Western had a holding company in Colorado, there were 164 *banks* in Colorado representing 162 banking *organizations*. The five largest *organizations* controlled 52% of state deposits. By year-end 1970, there were 228 *banks* in Colorado representing 198 banking *organizations*. The five largest *organizations* controlled

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[3] 14 Colo. Rev. Stat. 14-3-1. A "facility" is permitted within 2,000 feet of the banking office.

[4] The district court's Memorandum Opinion and Order, dated July 12, 1971, is reported at 329 F. Supp. 1003. Because of Appellant's refusal to print the lower court's opinion in the Joint Appendix–notwithstanding Appellees' cross-designation of the opinion and the clear requirement to that effect imposed by Court Rule 36(1)(2)–it is, unfortunately, impossible for Appellees to follow the customary practice of citing the lower court's opinion by a reference to the Joint Appendix.

47.8% of state deposits (App. 1660-1661). Despite the proliferation of holding companies in the intervening decade, the number of organizations rose sharply and the share of the largest organizations had dropped meaningfully.[5] Over the same time span (1961-1970), the number of commercial banking organizations in the City of Greeley rose from 3 to 4 (and now 5).[6] Greeley is served by three banks of the Affiliated Bankshares of Colorado, Inc. group (Greeley National Bank, West Greeley National Bank and Cache National Bank) with deposits of $55 million (43.9%); FNB Greeley with deposits of $40.9 million (32.6%); United Bank of Greeley (a member of

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[5]Appellant makes an inept attempt to create an appearance of a trend toward concentration by comparing market share of *holding companies* in 1961 (at which time there was one) and in 1971 (at which time there were seven). While it may be technically true that "holding company" shares rose from 4.4% to 47.8%, that fact is competitively irrelevant. What *is* relevant is that in 1961 FNB Denver held 15.1%, while in 1970 FNB Denver and its affiliates in Bancorporation together controlled 12.9%; what is relevant is that in 1961, the five largest competitors in the State had 52% of deposits, whereas in 1970 they had 47.8% (App. 1661). Although Appellant's comparisons are thus irrelevant to these deliberations, surely a representation that "[b]y concentrating on the acquisition of local market leaders in Colorado's most significant banking markets . . . these seven companies *had obtained* 51 per cent of the State's total deposits . . ." (Government Brief, 5-6) so grossly distorts the truth—a loss of market share—as to raise fundamental doubts as to Appellant's faith in the merits of its case.

[6]The State Bank of Greeley converted from an industrial charter in 1965 (App. 277, 1356). In early May, 1972, the State Banking Board approved a charter for Colorado National Bankshares, Inc. in a new shopping center on the southern border of Greeley (*Denver Post*, May 2, 1972, p. 51) and the Board's formal opinion to that effect was issued on May 24, 1972 (*In re Application for Charter of Weld Colorado Bank*, Findings of Fact, Order Granting Application, Banking Board of the State of Colorado).

the United Banks of Colorado group) with deposits of $27.4 million (21.8%); State Bank of Greeley with deposits of $2.1 million (1.7%);[7] and now a new subsidiary of Colorado National Bankshares, Inc. (Colorado National).[8]

SUMMARY OF ARGUMENT

I.

HORIZONTAL CASE

Acquisition of FNB Greeley by Bancorporation was blocked by Appellant on the ground that Bancorporation was a critical potential entrant into Greeley, the absence of which from the pool of potential entrants would constitute, in reasonable probability, a substantial lessening of competition in that market.

There are five banking organizations with offices in Greeley, a city of 38,902 (Census population, April 1, 1970). Yet, of 126 free standing cities (not a part of a larger metropolitan area) with populations of 30-50,000 in the United States, 99+% are served by fewer or no more banking organizations than serve Greeley. One, Danville, Virginia,[9] is served by more, 113 by less. The average number of banks in such cities is 3.29 (App. 1686).

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[7] Deposits as of year end 1970 (App. 1692).

[8] Deposits as of year-end 1970, $315 million (App. 1371).

[9] Danville has a special background. When the Commonwealth of Virginia decided to abandon industrial banks (essentially small loan companies with the right to receive time deposits) as a form of financial business in the state, it provided by statute that already extant industrial banks could convert to commercial bank status without demonstrating a need for additional banks in the market

Weld County, where Greeley is located, has 17 banks.[10] Of the 2,810 counties or county equivalents in the United States with less than 100,000 population, only 3 had more banks than Weld.[11] The proposition that Greeley is in critical need of additional banks rests not then on underbanking—even Appellant concedes that a limited number of banks is structurally appropriate to local markets (Jurisdictional Statement ("JS") at 17, Government's Brief ("GB") at 23)—but apparently on a concept that even an appropriate number of banks is too few if absolute numbers are below Appellant's desired norm—a norm which would appear unachievable in practice.

Appellant's assertion that Bancorporation has some peculiar importance as a potential entrant is derived exclusively from its size. As wholly distinct from other industries, a bank is not free to select the size of its entry. A steel company may decide to erect a 500,000 ton steel smelting plant in Greeley and attempt to outsell the other local plants on price, quality or service. A banking organization can only apply to the regulatory agencies for

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served. 1960 Laws of Va., c. 62, as amended, 1950 Code of Va. (1966 Repl. Vol.) § 6.1-230. Of the seven commercial banks in Danville, two are conversions from industrial banks. (See *In re First & Merchants Corporation, Richmond, Va.*, 1971 Fed. Res. Bull. 691, 692; *American Bank Directory*, Spring, 1972.)

[10] Includes 16 (*Summary of Accounts and Deposits in All Commercial Banks*, Dallas Region, June 29, 1968, Federal Deposit Insurance Corporation), plus the new bank in Greeley subsidiary to Colorado National (n. 6, *supra*).

[11] McLean County, Illinois; Stearn County, Minnesota and Marathon County, Wisconsin (derived from *Summary of Accounts and Deposits in All Commercial Banks, June 29, 1968*, U.S. Summary, Federal Deposit Insurance Corporation; 1960 Census of Population).

permission to open a single office at which it will solicit deposits. It has no right to pay interest on demand deposits–by law (12 U.S.C. § 371, 48 Stat. 181, as amended). It has a ceiling on the interest it can pay on time deposits–by law (12 CFR § 217.3(a)). Its ability to grow is therefore carefully constrained. Until it has deposits it cannot make loans. For this function, with these limitations, it is irrelevant whether a potential entrant is Bancorporation or any group of individual entrepreneurs. Between 1960 and 1970, 64 new banks were organized in Colorado, only 10 by the large holding companies (App. 1337-1372). Appellant offered no evidence that the performance of those 10 banks exceeded that of the remaining 54. By observation (App. 1337-1370), they did not. Any of the other 54 groups could, if the market seemed worth developing, move to open a new bank in Greeley. Neither the capital (a statutory minimum of $130,000) (12 U.S.C. § 51, 31 Stat. 48, as amended) nor the personnel requirements for this sort of operation would embarrass any potential entrant. This fact is an important basis of distinction from the companion beer case (*United States v. Falstaff Brewing Corp., et al.*, Docket 71-873), where market entry (in size, manner and method) can vary substantially, making the size of a particular potential entrant a very relevant factor. It is supposed, however, that Bancorporation, by virtue of its size, could force growth of its subsidiary faster than any other potential entrant (how we are not told) and therefore since, in Appellant's view, this would be more desirable, Section 7 of the Clayton Act must somehow have been violated. Even assuming a basis for this supposition, since the existence of an alternative to the small borrower is the key

criterion,[12] it is not clear why differing growth rates are relevant.

In any event, we are told, the acquisition of FNB Greeley by so large an organization would tend to entrench FNB Greeley's market share and drive away potential entrants.[13] The fact is that FNB Greeley's market share has been dropping steadily for 20 years. In 1950, it had half the deposits in Greeley. By 1970 this had dropped to 32% (App. 1692). Bancorporation believes that it can stop this consistent erosion of market position: by stiffening a persistently weak management, fighting harder for new business, and changing lending and investment policies (App. 280-286, 315-318, 324, 328, 1492-1532, 1823-1824). Appellees, however, would choose to characterize this market strategy as "competition" rather than "entrenchment." As to the prospect that Bancorporation might frighten off new entrants, we can only point to the experience of our two larger competitors in Colorado (Western and United). In markets where, by acquisition, they have owned banks for five years or more, 24 new banks have organized and have performed well after entry by United or Western via acquisition (App. 1337-1372).

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[12]As this Court noted in *United States v. Philadelphia National Bank*, 374 U.S. 321 360 (1963), larger customers have broader geographic horizons for their bank business.

[13]The "entrenchment" argument was a keystone of the complaint, the briefs, the testimony and arguments of Appellant below (App. 8, 78-79, 120-122, Plaintiff's Pre-Trial Proposed Findings of Fact and Conclusions of Law, 31-33; R. 1335-1336). The argument sank without a trace on this appeal. But even though not now articulated, this contention must be subsumed in justifying any theoretical distinction between a "significant" and a "foothold" acquisition.

It is further contended that, regardless of the effect in Greeley, the acquisition is part of a trend towards concentration in Colorado which is inimical to the very purposes of the Clayton Act and ought be interdicted on that ground alone.

This Court, in *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962), emphasized the importance in a Clayton Act context of blocking significant trends towards concentration.[14] Appellant has contended, at least fifteen[15] times, that banking in Colorado is undergoing just such a trend. Repetition, however, is a poor substitute for evidence. At year-end 1961, just before holding company structure became the vogue in Colorado, there were 162 commercial banking *organizations* in the State. At year-end 1970, there were 198 (App. 1660). At year-end 1961, the five largest banking organizations in the State had 52% of deposits held in State commercial banking offices. At year-end 1970 they had 47.8% (App. 1661). The *evidence* in this case shows an increase in competitive options and a decrease in the share of the large organizations. To say, as does Appellant, that, in Colorado "the trend toward concentration has rapidly accelerated" (JS 14, GB 18) or to speak of "the undisputed trend towards concentration throughout the state" (JS 15; GB 20) is a particularly offensive form of Orwellian "Newspeak." To be blunt, the Department of Justice is misrepresenting the facts to this Court in the

[14] The point was reaffirmed as recently as *Ford-Autolite*, where the Court cited favorably Senator Kefauver's reservations about "basic industries and business of America . . . controlled by a very, very small . . . number of corporations." *Ford Motor Co. v. United States*, 31 L. Ed. 2d 492, 499, n. 5 (1972).

[15] JS 2, 5, 10, 11, 14, 15, 16, 17, 18; GB 18, 20, 27, 28 (twice), 53.

apparent expectation that a monotonous repetition of that misrepresentation may somehow carry the day. A trend *away* from concentration cannot be transformed into its converse simply because Appellant would have it so.

The notion that Bancorporation is a potential *de novo* entrant is, in any event, spun out of sheerest gossamer. The executive officers of Bancorporation, at trial and on deposition, testified flatly that they would not consider *de novo* entry into Greeley (App. 277, 1824). In contradistinction to *El Paso* [16] or *Procter & Gamble* [17] or *Penn-Olin*, [18] there were no conflicting arguments in the files of Bancorporation–as to which Appellant made extensive discovery. The "objective" evidence supports this conclusion. Of all Colorado counties with population of 50,000 or more, Weld has–by far–the *lowest* population per banking office ratio. Of all Colorado communities of 20,000 or more, Greeley has the *lowest* population per banking office ratio. [19] All this was *before*

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[16] *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 654 (1964).

[17] *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568, 580-581 (1967).

[18] *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 165-167, 172, n. 5 (1964).

[19] Appellant contends that, although Weld County and Greeley have a very low office/population ratios for *Colorado*, Greeley, at least, is nonetheless reasonably proximate to *national* averages (GB 14, n. 18). Appellant argues from this that Greeley and Weld County are attractive markets for a holding company to enter *de novo*. We have demonstrated that they are the *least* attractive of the alternatives available to a Colorado holding company. Of what relevance to this purpose is a comparison to alternatives beyond the reach of Bancorporation?

the new Colorado National subsidiary was organized (App. 1693-1694). There are 13 communities in Colorado with populations of 25,000 or more. Bancorporation has no office in 11 of them. Of these 13, *Greeley* had the lowest absolute increase in population in the years 1950-1970 (App. 1376). If Greeley is now attractive as a situs for a *de novo* bank, it can only be far down the line of priorities among the alternatives which are available to Bancorporation throughout the State. After evaluation of these evidentiary predicates, the district court found:

> On the question whether the merger eliminates a potential entrant, we must conclude that it does not. (329 F. Supp. at 1015).

And earlier it had said:

> A "geographic market extension" merger can, of course, have the *future* effect of eliminating one who would have entered the market independently but for the merger, thereby adding to the number of competitors in the future, but there must be at least some evidence to support a prophecy that such an entrance will occur.[20] (emphasis supplied).

Appellant contends that a "foothold" entry, by acquiring a smaller bank in the market, would have been competitively preferable—apparently as an offshoot to its "entrenchment" theory that because of Bancorporation's size it could increase the market share of the "foothold" bank and thereby help to create a more egalitarian banking structure in the community.[21] A correlation between egalitarianism and competitive vigor is assumed.

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[20] 329 F. Supp. at 1011.

[21] See n. 13, *supra.*

In any case, the only bank in Greeley other than FNB Greeley not already a member of a holding company at the time of trial, State Bank of Greeley[22], has since applied to become a member of Central Colorado Bancorporation, Inc. There is no "foothold" bank by which Bancorporation could enter the Greeley banking scene.[23] The hazards of basing a reasonable probability of substantial lessening of competition upon predictions of what banking markets in Colorado may need in the distant future and who can fill these needs is nowhere

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[22] Testimony at trial showed that Bancorporation was not interested in acquiring State Bank and that State Bank was not interested in selling on any terms which would permit Bancorporation to assume active management of the Greeley operation (App. 277, 298).

[23] There is a small bank in each of the towns of Eaton and LaSalle, respectively 8 miles north and 5 miles south of Greeley, but in light of this Court's conclusions regarding the essentially local nature of most banking needs (*United States v. Philadelphia National Bank*, 374 U.S. 321, 358, n. 35, 369 (1963), *United States v. Phillipsburg National Bank and Trust Co.*, 399 U.S. 350, 361-362 (1970)), it could hardly be claimed that a Greeley customer could reasonably be served from one of these very small, out-of-the-way, farm towns. In any case, *no* evidence was offered at the trial to show that either would be a convenient alternative. There is language in Appellant's brief from which, if you slide by too fast, one might infer that Appellant is claiming that such evidence was offered: "the court did not discuss, however, the other two 'foothold' possibilities in the larger Greeley Area with respect to which the government had introduced evidence (see, *e.g.*, PX 73-83, App. 1097-1107)." (GB at 15). A careless reader might believe that Appellant was claiming that evidence had been offered about two banks which might be considered, from that evidence, as alternate entries into Greeley banking. Actually, all Appellant says, and all the transcript citations support, is that in those documents Appellant discussed "the larger Greeley Area"– the two banks were never discussed.

more clearly highlighted than here. Even *before* Appellant had solemnly assured this Court that Central Colorado Bancorporation could not be considered "capable of competitively significant entry [into Greeley]" (GB 11), Central Colorado had announced its intended entry.[24]

However, we are told that even probability of entry need not be relevant. The Appellant argues that Bancorporation ought not be permitted to acquire FNB Greeley because, on the "edge" of that market, Bancorporation exerts a beneficial effect upon the competitive conduct of the banks doing business in that market. Principal executive officers of each of those banks were called to testify whether a prospect of entry into Greeley by Bancorporation had affected their competitive conduct *in any way*. They all replied, simply, no (App. 301, 303. 305). But Appellant tells us that we must disregard the sworn testimony of the allegedly affected bankers, since their subjective conclusions as to their subjective reactions are not as reliable as Appellant's unsupported assertion that it knows better than they (JS at 23, n. 28). The contention is both absurd and offensive. Yet it is characteristic of Appellant's entire case. A proposition, at war with the factual record, is advanced as revealed truth. It is not proven; it is proclaimed. Appellant would reduce anti-trust bank merger litigation to a religious spectacle in which the devil is exorcised ritually by the anointed of the Lord. Evidence is a form of blasphemy.

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[24] *Denver Post*, March 26, 1972.

II.

VERTICAL CASE

Eight months after this action was filed, Appellant amended its initial complaint to charge that this proposed affiliation would, in reasonable probability, substantially lessen competition for "correspondent bank services" (a) by eliminating Bancorporation as a supplier of correspondent services to the competitors of FNB Greeley (on the thesis that they would be unwilling to do business with a competitor) and (b) by eliminating FNB Greeley as a customer of competitors of Bancorporation (on the theory that Bancorporation would not allow its subsidiary to buy correspondent services from a competitor of itself). Banks perform many services for themselves or for their customers; "correspondent bank services" are those same services when performed for customers who are also banks.

Both the Federal Reserve Board and Appellees herein pointed out [25] that an argument forbidding an acquisition because other banks in that market would be disinclined thereafter to do business with a competitor and would consequently have fewer offerors of services to choose from would bar *any* entry into that market by *any* offeror of correspondent services such as Bancorporation –whether by acquisition (large or small) or by *de novo* charter. The incongruity of protecting the sensibilities of competitors at the expense of any entry by the big Denver Banks (which Appellant is compelled by the dialectic of its major arguments to contend are the only likely entrants) finally penetrated and the argument was abandoned just before trial.

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[25] *In re The First National Bancorporation* (The Exchange National Bank of Colorado Springs), 1971 Fed. Res. Bull. 345, 348; Appellees' Trial Brief, 60.

Appellant continues, however, to press the second point of its "correspondent" argument. Using gross demand deposit balances of selected commercial banks held in other selected commercial banks as a proxy (*i.e.*, a measure or approximation) of "correspondent bank services," Appellant has calculated that the effect of this affiliation will be to eliminate 1.2% of relevant "correspondent bank services" recipients. This, together with 12.0% of relevant recipients already allegedly "foreclosed" by acquisitions of other offerors of such services (GB 58-59), Appellant contends, would constitute a substantial lessening of competitive vigor.

In order to arrive at these numbers, Appellant limited recipients of correspondent services to Colorado banks and offerors of correspondent services to six enumerated Denver banks. [26] Other offerors of correspondent services were excluded, either because they were not located in Denver, or because they did not offer a "full package of correspondent services." Other recipients of correspondent services from the six enumerated banks were excluded because they were not physically situate in Colorado and therefore were not "full package" recipients.

Appellant's universe, his proxy, and his geographic and product market are all so hopelessly gerrymandered to maximize percentages as to render them worthless as a measure of affected commerce.

Initially, use of gross demand deposits substantially distorts the universe. When a bank clears checks for another, it gives the bank credit for all items at the time

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[26] FNB Denver, United Bank of Denver, Colorado National Bank, Central Bank and Trust Co., American National Bank and Security National Bank.

those items are balanced. Particularly for out of town items, however, it can be several days before payment is actually received. The difference between the time credited and the time payment is received is called "float." A substantial portion (70% in the case of the FNB Greeley account with FNB Denver (App. 364-365)) of the demand balance kept with the bank which clears its checks is designed to cover average "float." It is only *net* balances which are available for use by the correspondent.[27] The other 10 banks in which FNB Greeley kept correspondent balances had no "float" and the total deposit was a net balance. Thus, "correspondent balances" of FNB Greeley at FNB Denver are overstated on the order of 4 to 1 by using gross demand balances.

Second, Appellant excludes from his universe the largest single offeror of correspondent services (particularly check clearing) in Denver—the Federal Reserve Bank. The justification advanced is that the Federal Reserve does not offer a "full package" of services. But then, very few commercial banks buy "full packages" of services. Including the Federal Reserve, FNB Greeley maintained balances on August 31, 1970 in 12 banks (App. 884). The *average* number of *listed* correspondents (and not all are listed (App. 502)) for a Colorado bank was 5.5 (App. 1336, 1396).

Third, most correspondent services are paid for in a manner wholly unrelated to deposit balances (*e.g.*, purchase and sale of federal funds, overline loans, purchase and sale of bonds, pension and profit sharing plan sales, credit card sales, data processing (App. 356-361)).

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[27]See App. 262-265.

Fourth, to the extent that net correspondent balances are a proxy for some correspondent services, there is no valid reason for excluding those banks, whether headquartered in Colorado or in other states, which are successfully competing with Appellant's six "chosen" banks in supplying services to other banks.

Fifth, about forty percent of gross correspondent balances (and probably a significantly higher proportion of net balances) of Appellant's "chosen" six are held from banks outside Colorado which are regularly serviced by the "six" (App. 1301). Because these banks are clearly alternative purchasers of the services involved and part of the market in which the sellers operate,[28] there is no valid reason why they ought be excluded from the universe.

Sixth, Appellant's contention that FNB Greeley would be "foreclosed" as a recipient of correspondent services by reason of the proposed affiliation and that subsidiaries of other holding companies having subsidiaries among the "Denver Six" are already foreclosed is contradicted by the record herein. FNB Denver is *now* a primary correspondent of some of the banks Appellant claims are already foreclosed by virtue of ownership of other holding companies (App. 346-350). Appellant offered *no* evidence to show that FNB Greeley would be foreclosed by reason of the affiliation. Appellant simply ignored the facts regarding allegedly presently foreclosed banks and *assumed* that FNB Greeley would be.

Seventh, the number of potential recipients of correspondent bank services, even limiting our inquiry to Colorado, has risen significantly in the last 10 years (App.

[28] *United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963).

435-436, 1660, 1661). Their deposit base has more than doubled (*ibid.*). The number of offerors of correspondent services rose from 5 to 6 (App. 210-211) and one of Appellant's witnesses testified that they would shortly increase that total to 7 (App. 163).

Finally, correspondent earnings are so small a portion of the business of a commercial bank that FNB Denver carries no separate item on its balance sheet to cover "correspondent banking"; it has 15 employees (out of 1,432) spending *part* of their time on correspondent banking business (App. 353); and the $2,500 net after-tax earnings of the FNB Greeley correspondent account in 1970 amounted to less than five one-hundredths of one percent of Bancorporation's net (App.1804). The entire subject is *de minimus*.

Thus, baldly stated, *Appellant's case comes down to this:* there is *no evidence* that Bancorporation intends to enter Greeley absent this affiliation nor that the market is in any way underbanked. There is *no evidence* that the state is unduly concentrated or trending that way. *No traditional violation* of Section 7 of the Clayton Act could be seriously advanced on the facts of this case. However, if the Court will permit Appellant to use the antitrust laws as the vehicle, *it will impose upon the banking industry a rule that no relatively large bank in a state can acquire a local bank with any appreciable share of that local market.* This will force the larger banks to seek alternative methods of expansion, severely check their growth and, over time, in a number of the markets affected, increase the number of entrants into those markets. While Appellant cannot demonstrate those effects with reasonable probability in particular markets, it reasons that these effects will logically follow upon the

adoption of such a policy. Such effects, Appellant contends, serve a valid competitive purpose. Regardless of how well served a market may be relative to its peers, "one more" is better, and thus the preservation of a particular prospective "one more" is a legitimate extension of Clayton Act doctrine.

We do not agree that competition would be a net beneficiary of the adoption of such a policy. Such a check upon the development of statewide systems would, in our judgment, impede the establishment of the vigorous competitive structures which are found in states where large branching or holding company systems have developed through affiliation of local banks with the major organizations in the principal cities of the state. The policy would, in all probability, reduce—not increase—the number of entrants per market. (See discussion, pp. 74-77, *infra*.) But we do not press either prognostication. Appellant seeks to use the Clayton Act as a vehicle for the structuring of banking upon a model which it believes will redound to the public interest. Appellant would succeed to that power over the structure of banking which is now, concededly, within the congressionally mandated province of the bank regulatory agencies.[29]

[29] The public interest standards of the bank regulatory statutes give the supervisory agencies very broad powers to structure banking along lines which encompass the branching, chartering, merger and general supervisory powers of those agencies. The agencies have indicated their willingness on many occasions, to utilize their powers and combinations of them to shape a particular market along desired lines without regard to the legal bounds of the antitrust laws. See, *e.g.*, *National Bank of Westchester, et al.*, Disapproval of Application to Merge, *1963 Annual Report of the Comptroller of the Currency*, where, after noting that:

> the effect of this merger would not be to substantially lessen competition or tend to create a monopoly or unreasonably restrain trade. . . . (at 145)

the proposed merger was nonetheless denied:

Appellant's instrument to this end is a statute designed to interdict reasonably probable substantial anticompetitive effects in particular markets. If the proposal neither fits the purpose of the statute nor the congressional divisions of responsibility—well then, make it fit. Appellant claims justification in asking this Court to legislate judicially because its motives are pure. It notes "[t]he ultimate

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> It is our view that these substantial benefits will more desirably be made available in Westchester County through the establishment of de novo branches. We believe that large scale entry by this merger would cause an unreasonable distortion and dislocation in the present and future banking structure of Westchester County not consistent with the public interest. . . . (at 141).

See also *First Bank Stock Corporation*, Order Denying Application, 1960 *Fed. Res. Bull.* 486, where acquisition of a proposed new bank chartered as an affiliate of a holding company was denied by the Federal Reserve Board:

> On the basis of all the facts, the Board must conclude that the proposed acquisition would . . . have potentially adverse effects upon banking competition in the future. To this extent, the acquisition would not be consistent with preservation of competition in the field of banking. The Board rejects Applicant's suggestion that only such a lessening of competition as would violate Section 7 of the Clayton Act may be regarded as an adverse consideration under the Holding Company Act . . . [I]n the Board's opinion, in reaching a decision, any significant lessening of competition, even though it may not be such as to violate the Clayton Act, is to be weighed as an adverse consideration. . . . (at 493)

The Federal Deposit Insurance Corporation, in a brief addressed to a U.S. District Court in a pending case, states flatly that "under the Bank Merger Act the FDIC has the authority and responsibility to disapprove certain proposed mergers which would not currently rise to the level of Sherman Act or Clayton Act violations." (Defendant's Opening Memorandum in Support of Motion for Judgment on the Record, at 2, *Washington Mutual Savings Bank et al. v. Federal Deposit Insurance Corporation*, No. 45-71C3, W.D. Wash.).

effect that [bank] expansion will have on the competitiveness of the banking business in this country will depend largely on the method by which banking organizations are *permitted* to expand" (GB, 17) (emphasis supplied). But there speaks the regulator, not the prosecutor. As to Bancorporation, Appellant would bar 4 of 6 proposed affiliations. The Federal Reserve Board only foreclosed two. Since the Board's orders can only be appealed if not supported by substantial evidence, they are, as a practical matter, final. Appellant urges (via an effectively *per se* rule) transfer of that same power to itself in those cases which pass the agencies' scrutiny. That, in our judgment, is a legislative perogative upon which this Court ought not trench. The issue is not whether Appellant's scheme would effect its end—diffusion of market structures—but whether the Congress contemplated the use of the Clayton Act as a tool for the reshaping of an industry along lines which the Department of Justice—and not the regulatory agencies—deems desirable regardless of the merits of the particular proposal under consideration.

ARGUMENT

I.

THEORETICAL UNDERPINNINGS OF A PUBLIC POLICY TO PROTECT COMPETITION

At the core of our social order is the concept that decision-making is effective in direct proportion to its proximity to the affected event. Businesses merge because their managers and owners believe there is more profit in operating together than separately. It is the special genius of the capitalistic structure that such judgments are not lightly to be negatived by the central

government.[30] Ideally, profits are the reward of superior efficiency, and the efficient utilization of resources is a root function of any society of men.

But when, through collusion of entrepreneurs or the gathering of the bulk of an industry into one hand, the profits of that industry are extracted from a people without recourse, by businessmen removed from the goad of competition, the ultimate goals of reasonable price and superior product are primary casualties. The antitrust laws are the tool whereby the social purpose of a capitalistic structure is protected from injury by its instrument of incentive–profits. The judicial function in an antitrust case is the balancing of the social end–efficient utilization of resources–and the utility of the means–a competitive business structure.

Section 7 of the Clayton Act is concerned with the structure of an industry, and how a reordering of the enterprises engaged in that industry may close off the ordinary pressures of the marketplace toward high quality at moderate price. The affiliation of independent market factors might not be tolerated if, in reasonable probability, it would have that effect in any substantial context.

Traditionally, it may be concluded that in reasonable probability a merger will substantially lessen competition

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[30]Appellant's brief reflects a clear conflict with this basic concept. Rather than interdicting mergers only when they transgress statutory standards and otherwise remaining aloof, Appellant adopts an activist, regulatory stand. "Section 7 reflects the fundamental concept of insuring that the profit motivation in our free enterprise system *is directed into* procompetitive channels." (GB 31) (emphasis supplied).

if it joins two companies having a combined significant share of the defined product market in a defined significant geographic market. When the affiliating institutions are not in the same geographic or product market, the affiliation may nevertheless be condemned if it brings into being conditions which themselves would, in reasonable probability, constitute a substantial lessening of competition in a significant geographic or product market served by either. The various conditions which might be hypothesized as bringing about such a substantial lessening in various contexts include "*over*-concentration"; elimination of an important present competitive stimulus on the participants in a specific market by the removal of a *potential* entry into that market; and the *triggering* of other anticompetitive affiliations.

We believe that none of thse standards will be transgressed by this proposed affiliation. After setting out Appellant's general hypotheses on potential competition and disposing of any spectre of actual competition, each will be treated in turn.

II.

POTENTIAL COMPETITION

Appellant's thesis is that Greeley is so highly concentrated that a substantial lessening of competition can be predicated on the removal of Bancorporation from the pool of entrepreneurs who might someday be moved to apply for a *de novo* office in the town. Bancorporation is clothed with a relatively unique posture by the hypothesis that other possible entrants have not our resources and are, therefore, not an hypothesized "substantial" potential entrant. In the alternative, it is suggested that our mere presence "in the wings" has had such a

beneficent impact upon the business practices and competitive vigor of the banking community in Greeley that our movement onto center stage would so dampen this competitive élan that it would constitute a substantial lessening of competition, without more.

One would expect an Herculean order of proof on Appellant's part to demonstrate the truth of these interwoven propositions, but, like a Potemkin village, the form *is* the substance and Appellant's proof is a repetition of his assertions. The degree of attenuation to which trial counsel for the Government was forced in order to match his proof to a semblance of Clayton Act standards is demonstrated by the following quotations from the trial record: "We are rejecting this notion of probability in terms of imminence or time frames, foreseeable future, this or that." (R. 1314). "That's the reason Section 7 was passed, Your Honor; was to stop this trend towards conditions which might lead to these abuses." (R. 1321).

A. Bancorporation Has No "Presence" in Greeley

Appellant concedes that "[n]one of Bancorporation's subsidiaries competes directly with Greeley area banks for local business" (GB 11), but offered three proofs[31] that Bancorporation is, to some extent, "a presence" in Greeley and is, therefore, likely to become more so if this affiliation is forestalled.

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[31]Appellant also contends in its brief that FNB Denver "had solicited trust business in [Greeley]" (GB 40) and cites as its authority for that proposition an earlier page in its brief. The only *record* reference to solicitation of trust business in Greeley was a flat denial by the chief trust officer of FNB Denver (App. 323).

(i) *Mortgage Servicing Office*

Certain large Eastern lenders solicit real estate mortgage business throughout the United States. Since they are usually not on the scene themselves, they ordinarily use mortgage service companies to obtain and service the loans in each locality. Some years ago, FNB Denver bought certain assets of such a servicing company in Colorado. It had and has an office in Greeley (App. 282, 1562). Whether this servicing is done by Bancorporation or by someone else, it is the business of the Eastern lenders. These Eastern lenders compete with other offerors of mortgage loans in Weld County. Bancorporation does not. (See App. 282, 425). Neither Bancorporation nor any of its subsidiaries solicit or retain Greeley area mortgages for their own portfolios.

(ii) *Solicitation of Greeley Merchants*

As evidence that Bancorporation competes in Weld County, Appellant introduced a cropped version of one of Appellees' answers to Appellant's interrogatories, (PX 38, R. 223). The cropped version implied that Bancorporation solicited the custom of certain Greeley merchants. Trial Counsel summed up the importance he attributed to this "fact" as follows: "And in addition to that it's not only a matter of soliciting and servicing big accounts, but our evidence shows that in addition some loan officers even solicit certain merchants up there. So, their existence in the Greeley area simply is a fact." (R. 1307). In fact, however, the entire interrogatory answer would have made it clear that the Greeley merchants visited by FNB Denver personnel were branch offices of large organizations whose Master Charge business had been solicited and won at *Denver*. The visits in question were

housekeeping calls in connection with that business. There was, in fact, no solicitation of Greeley merchants. (See App. 99-100).

(iii) *Weld County Borrowers from FNB Denver*

FNB Greeley has no substantial deposit or loan business in Denver and FNB Denver has no substantial deposit business in Weld County. This was conceded by Appellant's witness, Dr. Walsh (App. 65, 101). It is suggested, however, that FNB Denver's loans in Weld County ($7,129,000, App. 1057) constituted such a substantial "presence" in the market as to put FNB Denver "on the edge of the market." $6.5 million of this $7.1 million (App. 1057Ø1058) was held in 13 overline and direct loans. By definition, an overline cannot evidence competition since it occurs only when the lending limit of the local bank has been exhausted. (See App. 101.) Similarly, the direct loans represented borrowing far beyond the capacity of the local banks to handle.[32] FNB Denver and FNB Greeley are 52 miles apart. There is no way in our lifetimes that these distances can be conveniently ignored. Banks that far apart cannot be meaningful competitors for the ordinary customer. Nor is there any evidence that they are competing for the big customer–a market FNB Greeley is not large enough to enter (App. 100-101, 417-418).

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[32]Compare the Board's approval of the affiliation: "Of Applicant's subsidiary banks, only its largest subsidiary draws any meaningful amount of business from Greeley or Weld County, and such business, which traces in the main to a few large customers with credit needs which could not be met by Greeley banks, does not appear indicative of substantial competition with [FNB Greeley]." (App. 1717).

But if the banks do not compete, if the mortgage service operation signifies a non-competitive "presence" and if the direct merchant competition is but a product of scissors and paste pot, when then of Bancorporation's presence "on the edge of the Weld County market"?[33]

B. Over-Concentration

(i) *What Is "Concentration"?*

To the extent that it contains fewer than an infinite number of entrants, every industry has a concentration ratio. That concentration ratio becomes relevant in an antitrust context when it becomes excessive. The problem is, of course, the standard of excess to be utilized. As an industry, banking is not concentrated, nor is it trending that way. There were 13,431 commercial banks in the United States in 1961; there were 13,686 at the end of 1970 (App. 1620).[34] The share of deposits held by the 10 and 100 largest banks in 1940 was 27% and 57% respectively. At the end of 1969, comparable shares were 25% and 51%, respectively (App. 385). In summing up its analysis of the market changes in banking the Federal Deposit Insurance Corporation in its 1960 *Annual Report* was constrained to remark:

> However defined, the banking 'giants' competing on a nationwide basis appear to be sufficiently numerous to maintain active competition among

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[33]The district court found, "[t]he evidence does not disclose that there is competition at the present time between The First National Bank of Denver and The First National Bank of Greeley." (329 F. Supp. at 1007).

[34]13,759 at year-end 1971 (*Changes Among Operating Banks and Branches - 1971*, Federal Deposit Insurance Corporation).

> themselves. Banking is perhaps the only industry in which attempts to demonstrate a decline in competition invoke the size of the 100 largest–or 50 or 25 or 10 largest–units in the industry in the nation. In any other industry–say automobile, steel or electronics–this many 'giants' would be taken as prima facie evidence of a high degree of competition. (at 60).

This is not to say, of course, that segments of the industry cannot go *contra* the national trend. Thus, in *Philadelphia Bank,* 374 U.S. 321, 331 (1963), this Court found a reduction–from 108 to 42–in the number of banks in the area there relevant and an increase in market share of the seven largest banks from 61% to 90% in the period 1947-1960 to be a critical element in its conclusion of violation.

This Court, from its first decision on the 1950 Amendment to the Clayton Act, has expressed the view that stopping trends towards high orders of concentration is a primary goal of the Clayton Act:

> The *dominant theme* pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a *rising tide of economic concentration in the American economy.*[35] (emphasis supplied).

This observation is supported by the legislative history:

> Measured by practically any method and compared to practically any standard, the level of economic concentration in the American economy is high . . .
>
> Moreover, the long term trend of concentration has been steadily upward . . .

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[35] *Brown Shoe Co. v. United States,* 370 U.S. 294, 315 (1962).

> Such in general outline is the broad economic problem of high and increasing concentration with which this legislation is concerned.[36]
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> * * * *
>
> While there exist many differences of opinion on other aspects of the monopoly problem, there is substantial agreement that the level of economic concentration is extremely high.[37]

Senator Kefauver, one of the authors of the Amendments to the Clayton Act spoke movingly to the question of the statutory purpose of avoiding the concentration of an industry in too few hands:

> Charts and statistics will show that every year there is more and more concentration, with more and more corporations purchasing out their competitors, so that unless this trend is halted we are going to come to a place where the basic industries and business of America are controlled by a very, very small group of a small number of corporations.[38]

But this concern of both the Legislative and Judicial branches is with *trends* towards concentration, movement of an industry from one structural form to another. Implicit in that concern is the unstated premise that the companies being acquired were and would likely have remained viable absent their acquisition.

In attacking this acquisition, however, Appellant is constrained to apply a totally different construction to

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[36]H.R. Rep. No. 1991, 81st Cong., 1st Sess. 6-7 (1949).

[37]S. Rep. No. 1775, 81st Cong., 2nd Sess. 23 (1950).

[38]Hearings on H.R. 988, Subcommittee No. 3, House Judiciary Committee, 81st Cong., 1st Sess., May 18, 1949, Serial No. 10, at 12.

the word "concentration." We are told that Greeley is *in a state of* concentration. The proposed acquisition would neither initiate nor continue a trend towards concentration in Greeley. There are 2 *more* organizations now serving Greeley than there were 10 years ago.[39] Similarly, in Colorado, there are 36 *more* organizations than there were 10 years ago (p. 3 *supra*). It is the *present* structure of the market which is felt to be so substantially anticompetitive that an acquisition which no more than lessens (*arguendo*) the prospects of increase in the number of competitors must be struck down as, derivatively, substantially anticompetitive. Appellant's expert witness Hall testified that all Standard Metropolitan Statistical Areas are highly concentrated banking markets (App. 273). Appellant's expert witness Walsh concluded that any market–regardless of size–where the 5 largest entrants have 50% or more of the business is "highly concentrated" (App. 52, 78, 89). From that conclusion, Appellant infers a violation of the standards of the Clayton Act in this affiliation.

But Greeley is served by 5 banking organizations. As indicated earlier, only one city in Greeley's size category in the entire United States is served by more. Are we to conclude that banking in all cities, wherever situate, whatever the banking laws, and through whatever means the structure developed is substantially anticompetitive in structure? Appellant concedes that "local banking markets can support only a limited number of banks" (JS 17, GB 23). Does that natural structure compel a conclusion that such a market is inherently substantially anticompetitive? Was this Congress' intent in condemning "high and rising concentration"?

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[39] See n. 6, *supra*.

We believe that Congress used the word "concentration" in a pejorative sense, as something undesirable and which ought be corrected. Thus, while the Congress could well believe that some economies of scale–say the last 5 or 10% in production or distribution costs–could be sacrificed in order to shore up a market so poorly served that anticompetitive conduct by those occupying the market is likely and could be expected to swallow up those lesser economies and more, a suggestion that major economies ought be surrendered in order to protect a conceptualized ideal competitive environment[40] is to sacrifice ends to means, and this Congress surely did not intend. The *end* is superior product at low price. You must first assure that your structure permits a superior product and market efficiencies which effect significant cost savings. Then you look to a structure which supports the movement of these savings to the consumer.[41]

Thus, it is generally accepted economic theory that markets with significantly fewer competitors than are associated with the major economies of scale tend to be less responsive to the social needs for high quality and service at low prices than are markets where the number

[40]We do not suggest that the number of banking organizations serving Greeley or Colorado or the country as a whole is inadequate to effect a vigorous level of competition, but rather we contend that Appellant's unspoken thesis, "one more would be better," is not an open-ended social desideratum.

[41]In certain industries, market scale economies are so overwhelming that only one producer can be justified. These are so-called public utilities as to which rate regulation is essential to protect the consumer. Banking does not sit at this extreme–yet it is highly regulated. Clearly some compromise is achievable between the extremes of unregulated industry and the public utility. The balance struck in banking for cities of Greeley's size suggests that competition in this community is relatively very well served.

of entrants more closely approximates that theoretical desideratum. That theory holds that the farther from the desired norm, the less socially desirable is the conduct of the market participants. It is, of course, equally true that more competitors—even beyond the major efficiencies of scale—might try harder to conform to social needs than do the lesser number associated with such major economies. But we are postulating that the larger social end—an effective market structure—requires the latter number.

We conclude, therefore, that in its ordinary, or pejorative context, the word "concentrated" as applied to the structure of an industry must be taken to mean that the market in question has been preempted by fewer competitive entrants than could reasonably be accommodated within a given geographic market by the larger economies of scale appropriate to that industry. Thus, two competing gasoline stations in a community of 1,500 might be characteristic of a highly unconcentrated market while ten competing gas stations in a community of 150,000 could be characterized as "highly concentrated." It follows then that, in an industry-wide context, if the major economies of scale can be accommodated by only seven or eight suppliers, it would be improper to speak of the industry as "concentrated" because five of these have the dominant share of productive capacity.

For example, The Honorable George D. Romney, now Secretary of The Department of Housing and Urban Development, testified before a Congressional Committee inquiring into concentration in the automobile industry, while he was Chief Executive Officer of American Motors, that most of the economies of scale in auto assembly could be achieved in a two-line assembly

operation producing about 200,000 cars per year.[42] He testified that there could be further economies in a two-shift operation which would turn out about 400,000 cars, but that the single shift, 200,000 car producer would be a profitable and effective competitor. Addressing ourselves to auto production, we could well conclude that an ideal industry structure would be one where all producers approached the 200,000 unit annual manufacture. A reasonable argument could be made that a near doubling of the number of entrants might well justify the sacrifice of the minor economies of scale Mr. Romney saw in a two-shift, 400,000 car operation. But if the market could absorb only 1.2 million cars, it seems to us that that market would not be "highly concentrated" with 4 manufacturers, rather we think it approaches an ideal market situation in the public interest. On the other hand, assuming a market which can absorb 10 million cars a year, 4 manufacturers would appear highly restrictive and to comprehend a "highly concentrated" industry. No one, we submit, would urge that our country should structure its industries to deny to the consuming public at least the larger savings in cost which can be associated with size. Rather, we believe that the Congress' absorption with "high concentration" in its amendments to the Clayton Act was directed toward concentration which it felt significantly exeeded that associated with major efficiencies. (Note Mr. Justice Stewart's observation in dissent, *United States v. Von's Grocery Co.*, 384 U.S. 270, 288 (1966), that the level of concentration obtaining in grocery distribution must be

[42]Statement of George D. Romney on February 7, 1959, in Hearing (Administered Prices) before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 85th Cong., 2nd Sess., pt. 1, at 2842, 2851.

tested against the market reality that a single supermarket–through affiliation with a co-operative–could secure all of the larger economies of scale available to a chain.)

In an attempt to make an objective evaluation of whether Greeley's five banking competitors are too few, too many or just right, Appellees examined all cities which are not suburbs of larger metropolitan areas[43] which had 1970 populations between 30,000 and 50,000. As of January 1, 1970, there were 126 such cities. Their banking alternatives were as follows:

Number of Commercial Banking Organizations	Number of Cities
0	0
1	1
2	20
3	60
4	33
5	11
7	1

(App. 1686, modified to reflect the new Colorado National subsidiary in Greeley. See n. 6, *supra*).

Ninety-one percent of the independent cities in the United States of a comparable size to Greeley are served by fewer banking organizations. Ninety-nine percent are

[43]This would exclude only those communities which the Bureau of the Budget has defined as being within a Standard Metropolitan Statistical Area. They are excluded because such communities are usually not economically independent of the larger community within whose metropolitan area they are situate. Relevant comparisons are to Greeley and "free standing cities" in its size range.

served by no more. Only one city in the whole United States is served by more.[44] The only way in which we can conclude that Greeley is over-concentrated is to assume that banking is over-concentrated in *all* moderate-sized cities through the country. Plaintiff has the affirmative of this proposition. We note, however, that in 1966 the Congress immunized all bank mergers which had taken place prior to that year, largely freezing the level of concentration then obtaining.[45] This was accomplished without any dissent in a bill otherwise bitterly disputed. (See, *e.g.*, S. Rep. No. 299, 89th Cong., 1st Sess. 3, 7 (1965); H.R.Rep. No. 1179, 89th Cong., 1st Sess. 3, 5 (1965)). Whatever the justification for this special legislation, it is hardly compatible with a medium-sized city spectrum which is entirely over-concentrated. Congress' determination to fix extant levels of concentration is some evidence that said levels were not inconsistent with Congressional competitive goals. Moreover, five banking alternatives in one small city are not to be compared with four national manufactureres of sodium chlorate. Five banking alternatives in a small city show a highly *un*concentrated market.

Rather than assuming that all banking markets similar to Greeley are "highly concentrated," we submit that the more responsible presumption is that the norms for those 126 markets probably closely approximate the natural size patterns appropriate to the needs of the industry.[46] The proposition that local banking markets can support

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[44] Danville, Virginia, with 7 banks. (See n. 9 *supra.*)

[45] The Bank Merger Act of 1966, 12 U.S.C. 1828(c), 80 Stat. 7.

[46] A prosecutor would, of course, be free to show that such a presumption was without foundation in a particular context or industry. Appellant made no such effort in the case at bar.

only a limited number of banks (in which Appellant concurs (JS 17, GB 23)), means only that a limited number of banks is consistent with the larger economies of scale attendant upon the banking industry. Yet, it seems to us that a significantly smaller number of participants than the market can support must be an essential postulate to an hypothesis that lack of a particular potential entrant is a significantly anticompetitive event. If a market is appropriately served by the number of participants it presently has, the presence or absence of any number of "potential entrants" cannot be a significant competitive event. The word "concentration," as used in the debates on the 1950 Amendment to Clayton 7, is consistent only with a congressional premise that the industries under consideration contained substantially fewer companies than was consistent with their natural structure (see 95 Cong. Rec. 11484-11507, 81st Cong., 1st Sess. (1949)),[47] and not with any

[47]Compare industries previously examined by the Courts:

Sodium Chlorate–four manufacturers in the whole country (*United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), modified on remand, 246 F. Supp. 917, aff'd by an equally divided Court, 389 U.S. 308 (1967).

Aluminum Meat Pans–the acquired company had a national monopoly (*Ecko Products v. Federal Trade Commission*, 347 F.2d 745 (7th Cir. 1965)).

Cans and Glass–Second largest can manufacturer acquired third largest glass manufacturer. Both industries qualified as highly concentrated (*United States v. Continental Can Co.*, 378 U.S. 441 (1964)).

Beer–Ten largest brewers in the U.S. had increased their market shares from 40% in 1953 to 57% in 1963, while the market share of the twenty-five largest increased from 40.3% in 1946 to 82.2% in 1963; number of brewing companies had dropped from 307 in 1952 to 144 in 1964 (*United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Calif. 1966) aff'd *per curiam*, 385 U.S. 37 (1966)), and to 79 in 1970, "in spite of the fact that beer sales have increased 38%

suggestion that the public interest in a quality product at a reasonable price was to be sacrificed on the altar of pure numerology in industry structures.

It would seem then that in order to prevail in a potential competition context,[48] the Department of Justice must initially demonstrate that the structure of the market is one which ought, consonant with the economies of scale of that industry, carry a larger number of entrants than are presently obtaining or as to which the short range needs of the market can reasonably be expected to require.

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in the . . . ten-year period [1960-1970]" (*United States v. G. Heileman Brewing Co., Inc.*, ___F. Supp.___ (E.D. Mich., June 20, 1972).

Liquid Bleach–Acquired company has over one-half of U.S. sales and acquiring company has over one-half U.S. sales in larger, related product line (*Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568 (1967)).

Steel Wool Pads–Effectively only two manufacturers in the U.S. (*General Foods Corp. v. Federal Trade Commission*, 386 F.2d 936 (3 Cir. 1967)).

Potash–only 10 producers in North America; acquired company was the largest (*United States v. Standard Oil Co.* (N.J.), 253 F. Supp. 196 (D.N.J. 1966)).

Metal Rolling Mills–four producers (*Allis-Chalmers Mfg. Co. v. White Consolidated Industries*, 414 F.2d 506 (3rd Cir. 1969)).

Certainly, the facts in those decided cases demonstrate a quite different competitive environment from that which the statistics earlier cited show to exist in banking.

[48] Analyzed in a different market, an accretion of power through a local acquisition could so aggravate a trend towards concentration as to be, in that market and in that factual context, a substantially anti-competitive event. Here, however, Bancorporation's market share is itself modest and is trending downward, not upward.

(ii) *The Relevant Market Share of Bancorporation Is Significantly Overstated by Use of Gross Deposit Data*

Appellant argues that Colorado is a "concentrated" state, and that certain inferences ought be drawn from the share of state deposits held by its leading banking organizations. It analogizes to deposit shares in other cases. But the institutions involved in the major banking cases discussed in various portions of its brief had in common substantial branching systems which permitted the affected institutions to accommodate a fair share of the smaller, retail customers throughout the market served. In this respect, this case differs substantially, and suggests a need for more sophisticated use of market share data.

Since Colorado does not permit branching, the larger institutions—to a markedly greater degree than in branching states—tend to be wholesale banks, catering to the special needs of the large business accounts, the geographic market for whom is national, or at least, regional, rather than statewide or local.[49] Thus, in mid-1968 (the latest period for which data were available before the trial herein), the five largest banking organi-

[49] *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867 (S.D. N.Y. 1965). "There can be no question that the banking industry, business, and the public regard wholesale and retail banking as a trade reality" (at 896). "The evidence shows that there is a direct relationship between the size of a bank and its ability to attract, serve, and keep wholesale customers. As a practical matter, small banks are not effective competitors for wholesale accounts" (at 905). "[T]he market for large deposits is national 'to a considerable degree' . . . large depositors do have nationwide deposit alternatives" (at 910). "[W]e conclude that the relevant geographic area of effective competition, for all wholesale accounts is the entire United States, regardless of the customer's location" (at 918). Accounts over $100,000 were found to be in the national market (at 921).

zations in the State had 48.3% of gross deposits in dollars, but only 26.0% of the number of accounts (App. 1688). This disparity reflects the reality that the smaller customers who are dependent upon local banks, are not nearly as dependent upon the larger banking organizations in Colorado as gross dollar deposits would tend to indicate. Bancorporation had about 6% of all accounts and 5.7% of all dollars on deposit in the smaller accounts in 1968. Translated into 1970 market shares, this would reach about 5% shares in both categories. The share of the five largest banking organizations in dollars and numbers of accounts in the various size categories of IPC accounts was then as follows:

Colorado Percentage, 5 Largest Banking Organizations

	Total	$0-$1M	$1-$10M	$10-$15M	$15-$25M	$25-$100M	$100M
Dollars %	48.3	24.8	35.3	38.6	45.0	54.4	78.0
No. of accounts %	26.0	23.9	32.2	38.6	44.3	51.9	68.6

Note that the share of the larger organizations in the small accounts is only one-third the share of those organizations in the large accounts. Yet these small accounts form the bulk of all banking business. In Colorado the breakdown was:

	Total	$0-$1M	$1-$10M	$10-$15M	$15-$25M	$25-$100M	$100M
Accounts	1,775,455	1,389,978	337,672	25,177	12,034	9,349	2,478
% of total	100.0%	78.3%	19.0%	1.4%	0.7%	0.5%	0.1%

To an even more marked degree, the market share of First National Bancorporation of Colorado tends to substantially overstate its penetration of the State totals in the smaller accounts.

Colorado Percentages, First National Bancorporation[50]

	Total	$0-$1M	$1-$10M	$10-$15M	$15-$25M	$25-$100M	$100M
Dollars %	15.0	5.7	8.9	11.1	13.1	18.5	27.3
No. of accounts %	6.0	5.2	8.0	11.1	12.6	17.1	22.2

[50]The gross data, and therefore proportionately the specific

Thus, it seems to us that a more valid test of market shares—accepting the relevance of statewide concentration in a state that does not permit substantial branching—would be either the share of the number of accounts or share of the dollars of deposit in those smaller accounts whose geographic relevant market lies within the boundaries of the State. We agree, however, with the bulk of economic observers that use of state statistics makes little or no economic sense.[51]

C. Bancorporation Is Not A Potential Entrant into Greeley

If Bancorporation would not enter Greeley by *de novo* charter, absent this affiliation, it is not a potential entrant and, whatever else might be said about the acquisition, the elimination of a probable additional competitive factor in Greeley is not in issue. In assessing what course Bancorporation would follow if acquisition of FNB Greeley (presently the only available bank in Greeley) was not possible, we can look to the announced intention of Bancorporation ("subjective" evidence) or to *our* assessment of the relative attractiveness of Greeley as a banking market when compared to other alternatives ("objective" evidence) or to a combination of these factors. At the outset, we are met by the claim of Appellant that this Court ought reject "subjective" evidence and look only to "objective" evidence.[52]

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categories, are lower today than in 1968 and should be adjusted downward.

Source: App. 1688.

[51] See n. 87, *infra*.

[52] "But the determination with respect to potential competition in a Section 7 case should not turn on such subjective, self-serving statements; the competitive status of a firm on the edge of the relevant market must be ascertained on the basis of objective evidence. . . ." (JS 19). [Continued]

Appellant is not being candid with the Court. If there had been a document in Bancorporation's files that articulated the position "We need to be in Greeley. Let's try this acquisition first and if that doesn't work we will apply for a new charter. However we get there, Greeley is a must market" or if on deposition, one of the officers of Bancorporation had responded, "Yes, I would go into Greeley by *de novo* charter if I couldn't have this acquisition," you may be sure that Appellant would not then be so quick to reject "subjective" evidence.[53] Such a find would have been tattooed on trial counsel's forehead and recited in Appellant's briefs repeatedly. And rightfully so. Whether Bancorporation would or would not enter Greeley by *de novo* charter if that were the only route open to it *is* a "subjective" question.

Let us pose this hypothesis. Assume that a bank holding company has indicated an intention to expand the markets it serves. Assume only two possible markets are available. Assume market A is a booming economic area, with a population growing far beyond state averages, served by one banking office although the population could support three (according to state averages). Assume market B to be stagnant and over-

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The thrust of Appellant's arguments here is that—as a general proposition—the testimony of parties to litigation ought be rejected as untrustworthy. Surely such a momentous step ought be predicated upon something more solid than Appellant's need for a leg up in one phase of one type of antitrust case.

[53] Indeed, the records in *Penn-Olin* (378 U.S. 158, 165-166, 172) and *Procter & Gamble* (386 U.S. 568, 580-581), *supra*, are rife with staff memoranda and studies recommending *de novo* entry. Appellant was quite willing to utilize those "subjective" representations and the cases were fought out on the weight to be given the various and conflicting subjective assertions. There is no conflict here.

banked. If the holding company is determined to seek a charter in market B and determined not to seek a charter in market A (for reasons personal to itself), then into which market is the holding company a reasonably probable potential entrant?

We do not ask this Court to reject "objective" evidence; we believe that it is a valid method of inquiry. Absent sworn testimony as to the intentions of the acquiring institution or documents speaking to that intent, evidence as to market attractiveness is a valid clue as to what those intentions might be. It is, further, a legitimate basis of inquiry into the truthfulness of a party's assertions. A court, faced with a clear body of evidence in flat contradiction to the testimony of a witness, is, of course, entitled to disbelieve that witness. Here, the trier of fact, the district court, after considering both "objective" and "subjective" evidence (329 F. Supp. at 1014-1015), "found in the case at bar that the evidence was clear that the Bancorporation would not go into Greeley on any foothold basis." (Hearing, 8/9/71, p. 40, App. 2007).[54] The question here is whether that

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[54] Several times (GB 14, 19, 49; JS 11, 15, 19), Appellant suggests that the district court misread Section 7 and applied the wrong statutory standards. But the district court concluded, after citing *all* adjudicated bank affiliation cases under Section 7:

> "We have sought to apply the standards laid down by the Supreme Court in [*Philadelphia and Phillipsburg*] to our facts in an effort to arrive at an accurate and fair decision herein. The main difficulty here is *the lack of cogent evidence which even suggests* that there is likely to be a lessening of competition as a result of this present acquisition." (329 F. Supp. at 1016) (emphasis supplied).

Elsewhere the court concluded that there is "no possibility" of entry into the market by Bancorporation and "a dearth of evidence

finding is so "clearly erroneous" as to warrant rejection by this Court.[55] There is no conflict in the expression of

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that Bancorporation has any threshold influence on competition at the present time." (329 F. Supp. at 1015). On "parallelism," there was "[n]o evidence whatsoever." (*Ibid.*). A careful reading of the district court's opinion discloses that each of the Government's points was most carefully considered in light of the statutory standards.

As to the Appellant's persistent claim that the court below "declined to consider the statewide trend toward concentration in evaluating the competitive effect of this acquisition" (GB 28), one would hope that the failure of the court to discern a non-existent trend might be judged as a point for, rather than against, the opinion.

[55] F.R.C.P. 52(a) provides: "Findings of fact shall not be set aside unless *clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." (emphasis supplied). See *United States v. Yellow Cab Co.*, 338 U.S. 338, 340-341 (1949), where the Court noted: "The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations–a not uncommon form of litigation casualty from which the Government is no more immune than others." The Court added: "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design." (*Id.* at 341-342). Rule 52(a) also applies to inferences drawn from undisputed basic facts. *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960), citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948).

Bancorporation's intent.[56] Appellant discovered thousands of pages of Bancorporation's files, deposed its senior officers and heard, without challenge, the testimony at trial without offering a scintilla of evidence to contradict Bancorporation's flat representations that, though it had not rejected *de novo* charter elsewhere (App. 1838, 1887), it would not, in the reasonably forseeable future, go *de novo* into Greeley (App. 277, 1824).[57]

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[56] In the companion *Falstaff* case (Docket 71-783), the Little study and the collection of data regarding New England beer distributors who would be willing to distribute Falstaff beer is "subjective" evidence which must be weighed against other "subjective" representations. The weight to be ascribed these factors is, of course, a responsibility of the trier of fact. But clearly, before discarding the entire concept of testimonial evidence by interested parties, we ought question whether such representations are not capable of verification and substantively valuable.

[57] Appellant argues that, in a previous application in Colorado Springs, Bancorporation had insisted that it would not enter Colorado Springs by any other method save by that acquisition, and, after the other party to that acquisition had withdrawn from the agreement, Bancorporation had filed an application for acquisition of a smaller bank (GB 33-34). This, it is contended, shows that Bancorporation's subjective representations here are not reliable.

But Bancorporation made no such claim. The application in question stated that Bancorporation wanted to acquire the bank, Exchange National, in order to utilize its acknowledged skills "to establish a major wholesale bank in downtown ... Colorado Springs" and that "it would be imprudent to allocate the human and financial resources required to accomplish [these] objectives ... if a smaller bank in the Colorado Springs area were to be acquired." There was no representation–anywhere in the application–that it would not acquire another bank if the proposed affiliation failed for any reason. When Exchange with-

The evidence at trial revealed that Greeley has had the lowest absolute growth of any Colorado community of 25,000 or more and that Bancorporation had no office in 11 of those 13 communities. The evidence showed that the population to commercial banking office ratio of Weld County was significantly lower than that of any other county in Colorado with population of 50,000 or more (following page) and that Greeley had the lowest population per commercial banking office ratio of any community in the State with a population of 20,000 or more (App. 1694). The district court concluded from this that "It cannot be said then that either Greeley or Weld County is underbanked." (329 F. Supp. at 1015). Even if one assumes that Greeley's moderate growth and population per office ratios make it an attractive situs for *de novo* charter, would not that same evidence make every other major population center in the State an even more attractive situs for new charter? And is it not then clear that, *relatively*, Greeley is the *least* attractive market for new charters in the larger communities in the State?

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drew, Bancorporation applied to acquire East Colorado Springs National Bank. That application candidly conceded that Bancorporation could only achieve more limited goals via that affiliation. "It should be evident, therefore, that Applicant does not claim the ability, through East Bank, to do all that its acquisition of a larger Colorado Springs bank would have made possible, either in supplying the capital requirements of the expanding industrial base of the City or in providing competition to its dominant institution, First National Bank of Colorado Springs. What applicant can and will do, however, is to make East Bank a much more meaningful alternative source of those services which can efficiently and conveniently be supplied by an institution of its size and at its location." It is to be hoped that Appellant will limit its wrenching of words and phrases out of context to its brief in chief in order that Appellees may be able to devote their oral arguments to the merits of the case.

In sum, the "objective" evidence in no way contradicts the unchallenged "subjective" evidence, but rather tends to confirm that Bancorporation is not a likely future potential entrant in Greeley.

POPULATION PER BANKING OFFICE
ALL COLORADO COUNTIES
50,000 OR MORE
(year end 1970)

In Descending Order of Population Per Banking Office

Name of County	Number of Banks	Population	Population Per Banking Office
Adams	6	185,789	30,964
Jefferson	11	233,031	21,185
Pueblo	7	118,238	16,891
Denver	31	514,678	16,602
Arapahoe	11	162,142	14,740
El Paso	19	235,972	12,419
Mesa	5	54,374	10,874
Boulder	12	131,889	10,991
Larimer	10	89,900	8,990
WELD	15	89,297	5,953

Source: App. 1693.

(i) *The Qualifications Necessary to Support a New Charter in Greeley are Shared by Many in Colorado*

Even in a critically overconcentrated market, the disappearance of one potential entrant (*arguendo*) could hardly be construed, in reasonable probability, to constitute a substantially anticompetitive event if there remain a significant number of alternatives (literally scores of potential entrants are suggested by the record in this case (*infra* pp. 54-55)). Thus in *United States v. El*

Paso Natural Gas Co., 376 U.S. 651 (1964), Pacific was the *only* extant pipeline tapping both Canadian and Southwestern sources within easy reach of the California markets (*id.* at 661). The cost of such a line could be measured in the hundreds of millions. Maintaining the independence of Pacific was critical to a possible dissolution of El Paso's monopoly position. Clorox' monopoly position in chlorine bleach was maintained primarily through advertising (*Procter & Gamble, supra*, 386 U.S. at 572). The products were fungible and purchase of any one in lieu of another rested on a fictitious image of superiority (*ibid.*). Procter & Gamble, already dominant in a related field, considering entry itself and being the largest advertiser in the world (*id.* at 573), was in a *unique* position to challenge Clorox' market power. Its removal from the pool of potential entrants would have been a severe blow to any hoped-for dissolution of Clorox dominance (386 U.S. at 575). In *Penn-Olin, supra* (378 U.S. 158, 163-164), Pennsalt was the *only* manufacturer of sodium chlorate in the United States without a plant in the Southeast, where there were but 3 manufacturers. Olin owned the patents on the manufacturing process (378 U.S. at 164, 175). Their jointure would mean that any new entrant would not only have to risk the millions associated with plant and sales establishments (see 217 F. Supp. 110, 129, n. 23), but would have to surmount high technical barriers. On remand to test whether one of the joint venturers would have gone into the market separately while the other remained on the edge of the market, Pennsalt testified that it had no intent, either to enter separately or to remain in active contemplation of such entry if Olin acted alone. The district court ruled that this factor determined the issue and dismissed the complaint (246 F. Supp. 917). The Department of Justice appealed, arguing for an "objective" test rather

than a "subjective" one. This Court affirmed 4-4 (389 U.S. 308).

It was at this juncture in time that the three-judge court in the first potential competition case in the banking industry, *United States v. Crocker-Anglo National Bank*, 277 F. Supp. 133 (N.D. Calif. 1967), decided in favor of the defendants. The court there ruled that, in a potential competition case, it was incumbent upon the government to prove—not that the banks could, absent the merger, have entered into each other's markets (as a possibility)—but that they would in reasonable probability have done so (*id.* at 190). The banks had testified that they had no such intention and, to the same effect, the Comptroller had testified that he would not have permitted substantial *de novo* entry even if they had applied. The Department of Justice did not seek review of this decision.

A number of mergers with potential competition aspects were abandoned by the banks when the Department of Justice threatened or brought suit. In May of 1968 a second potential competition case was contested —*First National Bank of Jackson, Mississippi—Bank of Greenwood, Greenwood, Mississippi.*[58] The Department of Justice lost this case in the district court, and again declined to appeal. Between August of 1968 and June of 1969, some eleven bank merger cases, entirely or basically potential in competitive theory, were filed. In a number, the banks abandoned their proposals. *First National of Maryland—First National of Harford County*[59] was lost by the Department of Justice, as

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[58] *United States v. First National Bank of Jackson*, 301 F. Supp. 1161 (S.D. Miss. 1969).

[59] *United States v. First National Bank of Maryland*, 310 F. Supp. 157 (D. Md. 1970).

were *Idaho First National Bank–Fidelity National Bank* [60] and the instant case. Each attempt by Appellant to stretch the rule of law enunciated by this Court on potential competition to the particular market structure of commercial banking was rejected–by eight different Judges representing a broad spectrum of political philosophies and involving disparate factual and geographical situations.

How do these legal precedents apply to our fact situation? While Bancorporation and Greeley do not presently compete, and there are statutory inhibitions on the development of such competition through branching, the holding company format offers a vehicle through which competition could, at least theoretically, develop. When does an affiliation of two business entities which could have competed sometime, somewhere, and to some extent, rise to the level of a "substantial lessening of competition"? The threshold question is, of course, the probability that, absent the affiliation the acquiring institution would have entered the market.[61] There is

[60] *United States v. Idaho First National Bank*, 315 F. Supp. 261 (D. Idaho 1970).

[61] Of course, the fact that two companies are affiliating does not make them potential competitors. "[I]t seems clear that 'the fact that one of the two parties to a merger is willing to engage in that transaction does not indicate that it is a potential competitor.' True, the party to the merger desires to enter the field of business in which the other party is engaged. That desire, however, sheds no light on the feasibility of the first party's entry apart from the merger. Any other rule would make every merger unlawful." Hale and Hale, "Potential Competition under Section 7: The Supreme Court's Crystal Ball," *The Supreme Court Review* 171 (1968).

In *Penn-Olin*, 246 F. Supp. 917, 934 (1965), the court pointed out that the plaintiff ha. the burden of establishing, by a preponderance of the evidence that the alleged potential competitor "as a matter of reasonable probability would have . . . entered the . . . market."

simply no evidence that Bancorporation had any intention of entering Greeley's service area absent this affiliation. There this exercise ought end.[62]

(ii) *Legal Precedents on Probability*

The most that can be rescued from this fact situation is that Bancorporation might, someday, somehow, enter the Greeley market by some means other than this affiliation. This is not enough. If we say that permission to establish a new charter might someday be granted, and that someday Bancorporation might become inclined to enter upon some supposed change in market conditions, we assert nothing more than that Bancorporation is potentially a potential entrant. But, as this Court noted in *Brown Shoe*:

> . . . Congress used the words '*may* be substantially to lessen competition' to indicate that *its concern was with probabilities*, not certainties. Statutes existed for dealing with clear-cut menaces to competition: no statute was sought for dealing with ephemeral possibilities. Mergers with a *probable* anticompetitive effect were to be proscribed by this Act . . . (emphasis supplied).[63]

and Judge Timber noted in *ITT-Grinnell*:

> While the line between 'possibilities,' 'certainties' and 'probabilities' may be difficult to draw in a given case, such difficulty does not relieve the Court of its

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[62] See the opinion of the district court in *Penn-Olin* on the second hearing, denying significant competitive effect of the joint venture on proof that Pennsalt had concluded it would not enter the market absent the joint venture (246 F. Supp. 917 (1965)). This judgment was affirmed by an equally divided Supreme Court (389 U.S. 308 (1967)).

[63] *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).

> obligation to do so in accordance with established legal standards. . . . Upon its face, Section 7 makes it clear that the statute is concerned with *probabilities*. . . .[64]

Similarly, the *Beatrice Foods Company* opinion of the Federal Trade Commission argued that:

> Much potential competition is simply too remote, speculative, or improbable to have demonstrable competitive significance. The elimination of such marginal potential competition is not so serious in its probable effects as to require remedial action under the antitrust laws. It is only when entry of a potential competitor is *probable* that the threat of his entry is likely to exercise a restraining influence on the pricing and other behavior of the dominant firms in the market.[65] (emphasis supplied).

The opinion of the distinguished three-judge court in *Crocker* (Circuit Judge Pope and Judges Sweigert and Zirpoli) on Plaintiff's Motion for Preliminary Injunction is on all fours on this point.

> We think it is plain that before a merger may be condemned merely because its effect may be to lessen *potential* competition it must be ascertained that the potential competition is a reality, that is to say, that there is a *reasonable probability of such potential competition.* (latter emphasis supplied).
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> The legislative history of the 1950 amendment of § 7 of the Clayton Act makes it plain that with respect to the question of whether the effect of a merger 'may be substantially to lessen competition'

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[64] *United States v. International Telephone and Telegraph Corp.*, 324 F. Supp. 19, 30-31 (D. Conn. 1970).

[65] *In re Beatrice Foods Co.*, Docket 6653, 67 F.T.C. 697, 719 (1965).

the proof must be that there was a reasonable probability that the merger would have the prescribed effect. As stated in the Committee Reports, '[t]he use of these words means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed [sic] effect, as determined by the Commission in accord with the Administrative Procedure Act.'

Of course, if the effect is to be judged only by 'reasonable probability' then *a fortiori* the existence of a potential competition must be judged according to the reasonable probability of the same. To say that it would be possible for Crocker-Anglo to move by *de novo* branching into the area of Citizens is not enough. The question is, has there been disclosed a reasonable probability that such would be the case? In short, our function is not to speculate upon the basis of mere possibility.

* * *

In this case there is another special circumstance which makes *proof* of probable prospective competition by Crocker-Anglo through establishment of *de novo* branches in the Los Angeles area well-nigh impossible. Unlike a grocery chain or hardware merchant or a steel manufacturer who can establish new outlets or plants where he wishes, Crocker-Anglo cannot establish a branch bank anywhere without approval of bank supervisory authorities. Whether the Comptroller would permit the establishment of sufficient branching in this area is so uncertain as further to throw this whole question into the field of speculation. At the time of his decision upon the application for merger the Comptroller obviously considered the five southern counties occupied by Citizens as already overcrowded with banks.

> We are compelled to conclude on this record that the evidence with respect to the alleged potential competition is wholly insufficient to permit us to make a finding of any lessening of competition in consequence of the merger here in question.[66]

One cannot, in the last analysis, postulate *probability* of competitive injury upon a possibility of competition.[67] But let us assume, *arguendo*, that Bancorporation is a reasonably probable *de novo* entrant into the market served by FNB Greeley.

Once reasonable probability of entry is established or, as here, postulated, the central question is whether the loss of that potential is itself reasonably likely to substantially lessen competition. It is only in a market already excessively concentrated, with few potential entrants, that the elimination of one potential entrant creates substantial competitive danger. For, if a market is already adequately served, the elimination of a potential competitor cannot occasion a substantial lessening of competition, however desirable one might view a store of reserves. Similarly, even in a critically overconcentrated market, the taking out of one potential entrant when there remain others is not to be confused with the unhealthy state of the market. Given a number of remaining potential entrants, the disappearance of one potential entrant is not likely itself to exacerbate the

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[66] *United States v. Crocker-Anglo National Bank*, 223 F. Supp. 849, 855-6, 859 (N.D. Calif. 1963).

[67] On remand, the district court in *Penn-Olin* (246 F. Supp. 917, 934 (1965) noted:

> It is, of course, possible that . . . Pennsalt alone would have constructed a facility. . . . Anything is possible. But, if the record is to be the criterion it is unlikely that this would have occurred.

existing situation sufficiently to *cause* a substantial lessening of competition.

Consider a commercial bank in Greeley. Unlike a manufacturer or distributor, a banker cannot build a facility to a chosen size. One does not open a bank with $40 million in deposits. A bank is established at $0 deposits and its plant is designed to comport with its position. No banker erects a mausoleum. He cuts his cloth to his market. Assuming regulatory approval, to open a small bank calls for one qualified lending officer and $100–300,000 (ascending by population category) in capital. Entrepreneurs on this scale are easy to find in Colorado. Between 1960 and 1970, 64 new banks were opened in Colorado (App. 1660), only 10 by men associated with the six largest banking organizations in the State (App. 1371-1372). There are no non-regulatory barriers to entry worth noting when one small state can create so many new enterprises in a single decade, or, on a national scale, when 1763 new banks can be organized within the same period.[68] Plainly there is no dearth of

[68] *Statistical Abstract of the United States*, 1971, Table 665. Compare entry barriers in other industries where alleged Clayton Act violations were considered:

1) *Natural gas distribution*–Pipe lines cost in the tens of millions of dollars; the number of fields is limited and the number of customers highly restricted. (*United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *Utility Users League v. Federal Power Commission*, 394 F.2d 16 (7th Cir. 1968).

2) *Beer*–A one million barrel facility (a minimum for efficient operation) cost about $20 million, aside from personnel and "the heavy promotional costs associated with introducing a new beer" (Pages 35-37 of the Government's brief in the companion *Falstaff* appeal). Only one manufacturer has entered the industry since 1947 (and he was an established Canadian manufacturer making a move into domestic markets). *United States v. Joseph Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Calif. 1966), aff'd *per curiam*, 385 U.S. 37 (1966)).

either capital or personnel to organize, buy or operate a modest banking facility. Yet Appellant seeks to preserve Bancorporation to fill no larger role.

Appellant seeks to lift Bancorporation out of this mass of "potential" entrants because it is the largest banking organization which is (a) not already doing business in Greeley (b) which could open a bank in Greeley. Although there are many which could enter Greeley, our size is held to render our potential entry a uniquely pro-competitive desideratum. Thus it is postulated that if

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3) *Potash*–Only companies with substantial capital resources could hope to enter this field of mining. (*United States v. Standard Oil Co.* (N.J.), 253 F. Supp. 196 (D. N.J. 1966)).

4) *Gasoline*–The drilling, refining and distribution of gasoline is enormously expensive (*United States v. Atlantic Richfield Co.*, 297 F. Supp. 1961 (S.D. N.Y. 1969)).

5) *Liquid Bleach, Steel Wool Pads, etc.*–Liquid bleach, steel wool pads and the like may be characterized as "high turnover, low priced mass marketed commodities which for all practical purposes are functionally and chemically identical, must rely heavily upon advertising, for they tend to be purchased by unsophisticated buyers on the basis of emotional appeal rather than upon the intrinsic merits of the product." (*United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 552 (N.D. Ill. 1968)). The enormous pricing advantages accruing to the large buyers in mass media advertising therefore makes entry into such industries a function of great size. (*American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *General Foods v. Federal Trade Commission*, 386 F.2d 936 (3rd Cir. 1967); *Federal Trade Commission v. Proctor & Gamble Co.*, 386 U.S. 568 (1967).

6) *Metal Rolling Mills*–The capital investment and the know-how level are both extremely high (*Allis-Chalmers Mfg. Co. v. White Consolidated Industries*, 414 F.2d 506 (3rd Cir. 1969)).

7) *Sodium Chlorate*– as in 6 (*United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), modified on remand, 246 F. Supp. 917, aff'd by an equally divided Court, 389 U.S. 308 (1967).

we were to open a bank in Greeley we could somehow use our deposits in Denver to increase our market share in Greeley more rapidly than could any of the other potential entrants and more quickly take away a large share of the deposits held by the other banks in the market and therefore become an important factor in banking in Greeley quicker than anyone else.[69] The proposition that larger deposits in market A will aid an organization to develop market B has a plausible ring to it. How does the rhetoric comport with the experience of Bancorporation's peers in Colorado, indeed in Greeley?

a. United Banks of Colorado has a larger deposit base than does Bancorporation (App. 1371). Four of its acquisitions are more than 5 years old (App. 1371-1372). In *Boulder* it acquired Mercantile Bank and Trust Company in 1966 (*ibid.*). At year-end 1965, that bank had 20.1% of commercial bank deposits in the City of Boulder. Until the organization of Affiliated Bankshares of Colorado in 1970, there were no competing holding company affiliates in Boulder. Nevertheless, United's share had dropped to 17.2% at year-end 1970 (App. 1689). The Boulder National Bank, an independent organization organized in 1964, rose over this same period from 0% to 8.2% (*ibid.*). In *Littleton*, United acquired the Arapahoe Valley Bank in 1964 (App. 1371-1372). That bank had been rapidly increasing its market share at the expense of Littleton National Bank for some years. The market share peaked in 1967 and has since slid off steadily (App. 1690). Two new banks have been organized in the market in the interim (*ibid.*,

[69] We seriously question whether preserving an organization as a potential entrant simply because (under Appellant's theory) it can grow faster than another potential entrant serves any demonstrable competitive purpose.

American Bank Directory, Fall, 1971 ed.). In *Aurora*, United acquired the second largest bank in 1964, the First Bank of Aurora, with a 1963 year-end market share of 41.7% (App. 1371-1372, 1691). By year-end 1970, its market share had dropped to 26.4%. It is now the third largest bank in the market behind a bank organized in 1963 (App. 1691). A fourth bank has been organized in the market since that time (*American Bank Directory*, Fall, 1971 ed.) In *Greely* itself, despite the fact that FNB Greeley lost more than 5 points in market share between 1964 and 1970, United has been able to do no more than maintain the market share which its previously independent subsidiary, Weld County Bank, had held in the first half of the 1960's (App. 1371-1372, 1692), although that bank had increased its market share at FNB Greeley's expense–by 5 points–between 1950 and 1960 (App. 1692). It remained for Greely National, then not associated with a holding company, to take unto itself and its affiliates the entire share (1964-1970) which had slipped away from FNB Greeley.

b. The experience of Western Bancorporation–16 times the size of Bancorporation (*Moody's Bank & Finance Manual*, 1971)–is similar. In *Englewood*, it acquired the Continental National Bank of Englewood in 1956 (App. 1372). Continental had 36% of deposits in 1955. Another bank was established in 1965 and is prospering. Continental's market share has dropped to 33% (App. 1351). In *Fort Collins*, Western had acquired First National with 51.1% of city deposits in 1957 (App. 1353, 1372). This market share held through 1970 (App. 1353) while two new banks entered the market (*id.*). In Denver, the market share of Western's American National Bank rose 0.4% while 17 new banks were organized (App. 1345-1350).

Thus the market experience of acquired subsidiaries of Bancorporation's larger competitors in the 7 Colorado markets in which they have acquisitions of 5 years duration may be summarized as follows: the market share of the acquired bank dropped perceptibly in 3 (Boulder, Aurora and Englewood), rose preceptibly in one (Littleton), and changed only by a fraction of a point in three (Greeley, Fort Collins and Denver). During the period in which those banks were controlled by these holding companies, 24 new banks were organized in their markets.

This experience of larger banking organizations in the same state, even in the same market, is not compatible with a conclusion that Bancorporation's acquisition of FNB Greeley would discourage new entrants or somehow preserve FNB Greeley's market share by force of Bancorporation's size; or that a *de novo* entry by a Bancorporation subsidiary (assuming agency approval could be obtained) would involve growth disproportionate to that obtainable by others.[70]

(iii) *Capacity to Enter*

A factor critical to a finding of violation of the statutory standards in all potential competition cases has been the fact that the merger has removed from the edge of the market a competitor whose entry awaited only the

[70] Bancorporation intends to reverse the historic slide of FNB Greeley's market share (App. 1692), but to do so by improving the quality of the management, by more and better services, by more aggressive solicitations and the like (App. 280-286, 315-318, 324, 328, 1492-1539, 1823-1824). We apprehend, however, Appellants' thesis to cover market shares obtained or preserved on account of size alone. That thesis is certainly at odds with the competitive experience encountered by the older and larger holding companies in the State. Appellant's n. 42 completely misapprehends the thrust of this discussion.

exercise of his own will. The following language from *Penn-Olin* (378 U.S. 158) is implicit in all the successful potential competition prosecutions:

"The District Court found that 'Pennsalt and Olin each possessed the resources and general capability needed to build its own plant in the southeast and to compete with Hooker and [American Potash] in that market. *Each could have done so if it had wished.*' " (*Id.* at 172) (emphasis supplied).

". . . [T]he sole test would not be the probability that *both* companies would have entered the market. Nor would the consideration be limited to the probability that one entered alone. There still remained for consideration the fact that Penn-Olin eliminated the potential competition of the corporation that might have remained at the edge of the market, *continually threatening to enter.* (*Id.* at 173) (latter emphasis supplied).

". . . [T]he 'effect on competition . . . is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's *eagerness to enter* that market, its resourcefulness, and so on.' " (*Id.* at 174) (emphasis supplied).

". . . The existence of an aggressive, well-equipped and well financed corporation engaged in the same or related lines of commerce *waiting anxiously to enter* an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." (*Ibid.*) (emphasis supplied).

". . . [T]he industry was rapidly expanding; the relevant southeast market was requiring about one-half of the national production . . . few corporations had the inclination, resources and know-how to enter this market; both parent corporations of

> Penn-Olin had great resources . . . each had the know-how and the capacity to enter that market and could have done so individually at a reasonable profit. Moreover, each company had compelling reasons for entering the southeast market. . . ." (*Id.* at 174-175).

The Regional Administrator of National Banks testified that he would not, in the foreseeable future, recommend a charter for an additional bank in downtown Greeley (App. 330).[71] In early May, 1972, the State Banking Board granted a charter for the fifth banking organization in Greeley in a shopping center on the southern boundary of the City. This now gives Greeley, with a smaller deposit and population base and a lower rate of population and deposit growth (App. 1376, 1689, 1692, 1694), one *more* banking office than the nearby city of Boulder.[72] Yet in 1970, the State Banking Board twice (App. 1695, 1702) denied new charters in Boulder on the ground that the city was already adequately banked.[73] Also, in 1971, the State Banking Board turned

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[71] Appellant contends (GB 41-42) that the testimony of the Regional Administrator should be disregarded, since his opinion is only advisory. But the Regional Administrator made it clear that he was testifying with the consent and under the direction of the Comptroller (App. 333).

[72] State Bank of Greeley, the most recent entrant into commercial banking in downtown Greeley, increased its deposits from $1.2 million in 1965 to $2.1 million in 1970 (App. 1356). This hardly suggests that "profit expectations in it are good" (GB 36) –one of Appellant's criteria for entry.

[73] "The Boulder community presently appears to be well served by existing financial institutions. . . .

"It could be argued that additional banks, conveniently located, will further the interests of the depositing public. A bank situated on every block would, no doubt, be desirable from the standpoint

down an application for a second bank in Northglenn, a community with 30,000 people (App. 492). Under these circumstances, we were somewhat surprised that the Board granted a charter in Greeley at all,[74] but, taken together with its contemporary denials in the larger Boulder and one-bank Northglenn markets, this approval compels the conclusion that no more charters are likely from that source in the foreseeable future.[75]

It would appear that, since only these two agencies could approve a new charter, for the foreseeable future, *there are no potential entrants into commercial banking in Greeley*. To characterize one as a potential entrant requires both intent and capacity. Bancorporation has plainly shown that it has no such intent. The testimony of

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of some depositors and prospective customers. On the other hand, we do not feel that such a chartering procedure would be in keeping with the trust imposed upon this Board by the Colorado General Assembly." (Order denying the application for charter of Boulder Valley Bank, Colorado State Banking Board, 2/3/70 (App. 1695, 1700)). It was these statements in the context of the disparate sizes of Boulder and Greeley together with the Commissioner's refusal to reject the quoted language as reflecting his office policy (App. 492), that formed the predicate for the district court's view that the State Banking Board was unlikely to grant another charter, (329 F. Supp. at 1015). We do not believe that this judgment was an unreasonable one.

[74] The Board stated that it was impressed by the deposit growth in Greeley between 1960 and 1971, but the record in this case discloses a Greeley deposit growth of 144% between 1960 and 1970 and a Boulder deposit growth of 226%. (Aurora, 330%; Colorado Springs, 169%; Englewood, 145%; Fort Collins, 297%; Lakewood, 196%; Littleton, 160%; Loveland, 175%; Wheatridge, 1024%) (App. 1337, *et. seq.*). Indeed deposits in the State as a whole grew 116% over that time span (App. 1660).

[75] The record on the approval suggests that there was another applicant for the site in question. (See n. 6 *supra*.).

one regulatory agency and the actions of the other tend to negate capacity.[76]

It is, of course, possible that the State Banking Board could reverse its entire statewide policy and charter still an eighth bank in Greeley. But is this a reasonably probable course? Is it not reasonable to say that, whatever its intent, Bancorporation does not appear to have the *capacity* to enter Greeley *de novo*?

If any area is "over-concentrated" as defined by a small number of banks sharing the market, it would be Montbello. Certainly, Montbello is more attractive than Greeley in that it has a five year anticipated growth of 10,000 in employees and population of 40,000 people

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[76] Appellant claims (GB 43) that the attitude of the regulatory authorities should be disregarded, because "[t]o assume . . . the regulatory agencies would not permit a new bank in the Greeley area would be at odds with the policy reflected in Section 7 of the Clayton Act that "corporate growth by internal growth is socially preferable to growth by acquisition," citing *Philadelphia Bank, supra,* 374 U.S. at 370. But this quotation, in context, has different implications:

> "There is an alternative to the merger route: the opening of new branches in the areas to which the customers have moved—so-called de novo branching Appellees do not contend that they are unable to expand thus, by opening new offices rather than acquiring existing ones, and surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition."

In Colorado, a unit bank state, this "socially preferable" route is closed to Bancorporation. Certainly *Philadelphia Bank* does not stand for the proposition that the attitude of the regulatory agencies should be disregarded. Indeed, the Court there recognized that "Entry is, of course, wholly a matter of governmental grace." (*Id.* at 368, n. 44).

(App. 351) from a 1970 base of under 10,000. Nevertheless, Bancorporation's application for a national charter in Montbello was recently rejected in order to protect the single small bank now serving the market. Bancorporation had foreseen this possibility and had sought Federal Reserve Board permission to acquire Montbello State Bank, the sole market occupant. The Board rejection was couched in terms of a need for more competition in the market and urged Bancorporation to seek a new charter (App. 1750, 1755-1756). The minority (4-3) correctly foresaw what would happen and suggested that the majority was simply frustrating any meaningful development of the market (App. 1758-1759). So it came to pass. One agency predicting the needs of a market regulated by another erred as to the available alternative routes. But if a bank regulatory agency can make that sort of mistake, how much more prone to error is a prediction of an agency (Appellant) with a single orientation towards maximizing numbers of entrants.

(iv) *The City of Greeley is Not an Oligopolistic Banking Market*

Of course, any pool of "potential entrants" is entirely unnecessary if the market is one adequately served by the number of competitive alternatives already there. It is only when the market is substantially inadequately served that potential competitors become relevant. Thus, in *Penn-Olin*, the Court concluded:

> The position of a company [citing *El Paso*, 376 U.S. at 660] 'as a competitive factor . . . was not disproved by the fact that it had never sold . . . there . . . [I]t is irrelevant in a market . . . where incremental needs are booming.' [Court's elisions.] The existence of an aggressive, well equipped and

> well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an *oligopolistic* market would be a substantial incentive to competition which cannot be underestimated (378 U.S. 158, 174) (emphasis supplied).

Greeley is not a market "where incremental needs are booming"–Weld County, of which it is the County Seat, has grown only about 40% over the past thirty years.[77] During the same period national population grew 52%; State population grew 96.5%; and counties located along the Rocky Mountain front, as a group, grew 261.3% (App. 1373-1376). But even more critically than this modest trailing growth pattern, Greeley *is not an "oligopolistic market."* It is true that the Appellant persists in so representing the city,[78] but this is a mere *ipse dixit* on a proposition as to which Appellant bears the burden of proof. For all that we have seen so far, the

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[77] Appellant (GB at 9) attempts to belie the district court's finding that the Greeley area had attained only a "moderate" amount of economic and population growth over the last decade (329 F. Supp. at 1015) by pointing to a population growth in the "Greeley Area" from 45,228 to 58,500 between 1960 and 1970; to telephone increases of 48.2%; and to personal income up from $119.5 million in 1959 to $212 million in 1968. However, the population increase in the "Greeley Area" included 6,000 college students (App. 1379). Permanent population increases were 16%. Colorado grew 25.8%. Telephone connections in the United States rose 62.2% (*Statistical Abstract of the United States*, 1971, Table 757). Personal income increases translate from $1,691 per capita in 1959 to $2,467 per capita in 1968 or 45%. But comparable United States figures rose 66.4%–from a higher base in 1960 at $2,236 to $3,720 in 1968. (*Id.*, Table 492). Placed in some sort of context, Appellant's free-form statistics confirm, not belie, the district court's finding of fact.

[78] Complaint ¶ 11 (App. 6): "Commercial banking in Greeley is highly concentrated"; Complaint ¶ 12 (App. 6): "Commercial banking in the Greeley area is also highly concentrated."

support for this representation is much like Humpty Dumpty in Alice in Wonderland: "When I use a word, it means just what I choose it to mean—neither more nor less."[79] Greeley is a concentrated [*i.e.* oligopolistic] banking market because, it would appear, Appellant says it is.

(v) *Time Frames for Entry*

It appears to be the view of the Department of Justice that where potential entrants are—or are contended to be—few in number, they must not be permitted to merge or affiliate into a market even in the face of evidence that such market cannot now absorb further entrants, and even when in fact there is an extraneous impediment to entry. Appellant would have such companies serve as sentinels, like the guards at the gates of Pompeii, awaiting through the centuries the day and the hour—if any—upon which they might usefully add to the pool of participants in the market.

Judge Nixon, in *United States v. First National Bank of Jackson*, 301 F. Supp. 1161 (S.D. Miss. 1969), adopted a standard of time frames similar to that adopted by the court in *United States v. Crocker-Anglo National Bank*, 277 F. Supp. 133, 188, 190 (N.D. Cal. 1967), as to potentiality of competition. He said, "our determination of whether or not the proposed merger of the Defendant banks is proscribed by Section 7 of the Clayton Act, that is, whether it *now or within the reasonably foreseeable future* will have the effect substantially to lessen competition actual or potential," will depend on the facts (301 F. Supp. at 1188). Judge Boldt specifically concurred in this conclusion in *United States v. Idaho First National Bank*, 315 F. Supp. 261, 274 (D. Idaho 1970).

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[79] Carroll, *Through the Looking Glass*, Chapter VI.

Similarly, Appellant argued for an indefinite time frame in *United States v. First National Bank of Maryland*, 310 F. Supp. 157 (D. Md. 1970). This was implicitly rejected by the court in its approval of the merger.

To attenuate a "may be" statute through "potentially may be" to "at some future time potentially may be" stretches the concept of reasonable probability beyond bounds.

Can one look down the years and say—yes—at this point in time the market will be ready? Plainly our crystal ball is not that clear.

D. "Triggering"

No bank affiliation can "trigger" any other bank affiliation. No bank may affiliate with another without the explicit approval of at least one bank regulatory agency. No bank affiliation can be approved by any bank supervisory agency without complete and careful prior analysis of the competitive effects by the Antitrust Division of the Department of Justice (as that agency is required to do by statute in this industry and in this industry alone).

No two banking organizations can consummate an affiliation which is opposed by the Antitrust Division of the Department of Justice; because in this industry, and in this industry alone, the Department of Justice has an automatic injunction imposed by force of the mere filing of a complaint, and no merger can be consummated until thirty days after the Department of Justice is advised that the bank regulatory agency has approved the affiliation.[80]

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[80] 12 U.S.C. §1828(c).

The Federal Reserve Board commented as follows:

"Insofar as any 'triggering effect' which approval of the application may have, each subsequent application also must receive the approval of the Board. Presumably, one of the reasons for the requirement of administrative approval of individual cases, rather than the establishment of firm legislative guidelines, is to permit the recognition of distinctions which may exist among cases which would otherwise be grouped in proscribed or permitted categories. [Each] application should be analyzed on the basis of the competitive structure of the market and other facts existing at the time of the Board consideration of the matter." (App. 1772).

E. Potential Competition Summarized.

(1) Bancorporation has no intention of entering the Greeley market other than by this affiliation. This flat assertion is uncontradicted and comports with the "objective" facts associated with the area, *i.e.*, relative attractiveness of Greeley as a banking market.

(2) Bancorporation probably could not secure a charter even if it sought one. It does not appear likely that the regulatory agencies would permit it.

(3) Greeley is not a "highly concentrated" market as that term is comprehended by the Clayton Act. The number of banking organizations serving Greeley is far in excess of the national norm, which, in the absence of evidence to the contrary, must be concluded to relate to the principal economies of scale attendant upon that industry.

(4) More than 60 entrepreneurial groups in Colorado have formed new banking organizations in the last decade; the capital and technical requirements for a new charter are so modest that the withdrawal of a particular

(*arguendo*) potential entrant, of whatever size, would have no discernible impact on this widespread pool of remaining putative applicants.

Appellant bore the affirmative burden of establishing each of these propositions. Each would seem critical to his case. We submit that the only evidence submitted on any of them went to the negative of the proposition. Appellant's case failed for want of evidence on *every* key issue. Rhetoric is not an acceptable substitute.

III.

BENEFICIAL COMPETITIVE EFFECTS

In *Philadelphia Bank, supra*, 374 U.S. 321, 371, this Court stated that an otherwise *unlawful* merger "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." Such are the rags and patches from which this suit is stitched that appellant feels compelled to contend that even if there are *pro*-competitive effects of this affiliation in the affected market, they are to be wholly disregarded in determining *lawfulness* if any anticompetitive effects can be found (GB 51). Under those ground rules, if the final score after the evidence was in on the competitive effects of this affiliation was Appellees 35, Justice 7, then Justice would win. Although we do not concede the 7 points, we conceive the argument to be a perversion of the statute.

A. Bancorporation Will Help FNB Greeley to Become a More Effective Bank.

There are important procompetitive effects of this proposed affiliation. FNB Greeley has had a steadily declining share of Greeley deposits for the last 20 years.

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[81] Appellant would sweep the *market* pro-competitive effects of the acquisition under the rug by calling pro-competitive effects a defense under "convenience and needs" and anti-competitive effects a violation of the Clayton Act (GB 51). This is semantic nonsense.

Its 49.8% share in 1950 dropped to 32.6% in 1970 (App. 1692)—a consistent trend both before and after the holding company affiliations of its primary competitors.[82] This inability to compete effectively was broadly attributed by the Regional Administrator of National Banks to persistent management deficiencies (App. 327-328; see also App. 284, 404, 1530).[83] Further, the application to the Federal Reserve Board for approval of this affiliation had noted a heavy emphasis on agricultural lending, with a corresponding weakness in consumer and real estate financing in the FNB Greeley loan portfolio (App. 1429, 1494-1502; see also App. 279-280, 1381). Bancorporation has pledged to supply competent personnel to fill the management gap; to supply technical personnel in consumer and mortgage financing; and to supply one million dollars in additional capital for an agricultural credit corporation (App. 279-282, 1495-1497, 1530). This last would free seven million in FNB Greeley loanable funds for the consumer and mortgage fields, while maintaining FNB Greeley's present

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[82] Thus, Appellant is simply wrong when he attempts to distinguish this case from *Penn-Olin* on the ground that that case involved "new actual competition which may have had a significant deconcentrating and pro-competitive effect" while "this case simply substitutes one competitor for another and thus has no potential deconcentrating effect whatsoever" (GB 35, n. 38). It is not an unreasonable assumption that FNB Greeley's market share losses reflect an ineffective competitive force. Under the circumstances, substitution of Bancorporation would appear to have "potential deconcentrating effect" on the market.

[83] This is not to denigrate the present senior management of the bank. The Chief Executive Officer of FNB Greeley was a leading attorney and a prominent businessman in Greeley when he was called upon to assume the presidency of the bank several years ago in order to settle a crisis in confidence in the bank after a series of bad loans. He is, however, not a trained banker. The bank's executive vice-president is a fine banker, but a persistent heart condition limits the responsibilities he can assume.

agricultural commitments (App. 281). There can be no question but that this would make FNB Greeley a more effective competitor. As the Chief Executive Offficer of FNB Denver (principal operating subsidiary of Bancorporation) testified on deposition:

> If we can compete in Greeley with the United Banks of Colorado and the A.B.C. group, there will be competition: I'll guarantee you there will be a hell of a lot of it that is not there now, and has not been there in the past. (App. 1823-1824).

These are pro-competitive effects of the proposed affiliation.[84] They would not be lost by showing that there are others who would do as much for FNB Greeley (although Appellant has not even done this). For, if we assume that there are other interested banking organizations or groups of entrepreneurs which could similarly supply the management, the knowhow and the capital to reverse FNB Greeley's historic market decline, then *a fortiori*, we assume that they could acquire or organize and staff a much smaller bank. Their interest, if any, in the market as a focus for *de novo* entry should logically be unimpaired. If a larger organization than Bancorporation (United) and the strengthening of the dominant organization in the market (through ABC) did not chill the theoretical interest of this assumed group, why should we?

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[84] Appellant suggests that these effects would not materialize because the acquisitions of the other two leading banks in the market, which Appellant had permitted, had not occasioned such effects (GB 51-52). But the Affiliated Bankshares group had only been in existence for a few months at the time of the trial of this case and had not yet had a chance to become operational, while United subscribes to a wholly distinct policy of allowing each bank in its system to operate independently (App. 464). No test had been made in the market.

B. Bancorporation Is Itself an Effective Competitor

Appellant suggested to the Court below that one anticompetitive effect of the proposed affiliation would be an increased potential for sophisticated anticompetitive conduct in Greeley and in other markets in Colorado upon the part of "statewide" organizations to the detriment of competitive vigor in those markets (JS 17; GB 21-22, 24-25, 50 and 51).

The burden of establishing this proposition was Appellant's. As the district court pointed out, there was no "cogent evidence *which even suggests* that there is likely to be a lessening of competition." (329 F.Supp. 1016) (emphasis added). We note initially that Bancorporation is not a "statewide" institution; at the time of trial its only banking offices were in Denver. [85] As Bancorporation was sued on its first proposed acquisition, it would seem that this attack might more properly be raised against United, Western or ABC which already have subsidiaries in a number of markets. Appellant's *sole* documentation of its thesis was a memorandum (App. 1267-1268) from the Business Development Department of FNB Denver, written to recommend what steps it ought to take in response to an innovative service charge program instituted by The Colorado National Bank. The memorandum recommended that FNB Denver ought to *beat* the rate schedule of Colorado National but warned against too radical a difference. "The theory behind this was to keep from undercutting the Colorado National to such a point that we would start a service charge war, which could end in giving away all checking accounts. This is also a simple formula to explain and advertise." We do not think that

[85] Indeed 107 of the 127 communities in Colorado with banks have no holding company subsidiaries among their entrants (App. 396).

this statement reflects anything more than the rational business judgment of a vigorous competitor. Had it been the final word of FNB Denver on the subject, we would argue that it reflected a healthy competitive milieu. But it was not. The executive committee of the bank rejected the proposed rates. They chose to adopt even lower, more aggressive schedules (App. 344).

C. Competition Among Denver-Based Banks Is Intense—Competition Among Local Banks in Smaller Colorado Cities Is Not.

Appellee did not rest, however, with the negative of the proposition. Our experience in the State suggested to us that not only was Appellant's propositon without substance, but that the converse was true. We believed that FNB Denver was an aggressive bank in a tough banking market, while competition in the smaller outlying cities of the State left much to be desired. We set out to prove that proposiiton.

We reasoned that an acquisition in a new market by any organization could hardly be found substantially to lessen competition in a not very competitive market and that a vigorous competitor might be given the benefit of an assumption that its policies would have continuity and not be abandoned in the first new market it reached. Dr. Nevins Baxter, a leading banking economist, was asked to survey the business practices of banks in cities throughout the State of Colorado. Dr. Baxter and his staff interviewed over a hundred bank customers throughout the State as well as the management of a number of banks in Denver, Greeley and other communities in Colorado (App. 406, *et seq.*) They found significant differences in competitive conduct. FNB Denver was an aggressive bank; FNB Greeley was not (App. 404). Whereas Denver is an actively competitive market (App. 408), generally there is little active banking competition in smaller Colorado communities (App. 407, *et seq.*). The

Regional Administrator of National Banks testified to the same effect (App. 331).[86]

If we concede that non-competitive conduct on the part of the holding companies would have a more pervasive effect if they occupied a more prominent role in Colorado banking, must we not equally concede that vigorous competition on their part would have a more general effect if they occupied a more prominent role in Colorado, as well? And if the evidence adduced in this case clearly supports the latter conclusion of fact, ought we not opt for expansion of the holding companies rather than reject these *present* competitive advantages for fear of *possible* competitive disadvantages later?

Expressed in its simplest terms, Appellant argues that Bancorporation and its competitors ought not be permitted to take over the banks in Smalltown, Colorado, because if they conspired not to compete in Denver the effect would spill over into Smalltown automatically. But if there is now no competition in Smalltown and there is in Denver, ought not the healthy competition of Denver spill out into Smalltown, equally automatically? In an imperfect competitive environment (Colorado), competition is best served by the holding companies. If competition is our goal, how do we sustain it by suppressing holding company growth?

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[86] On page 51 of its brief, Appellant continued its distressing habit of making representations of fact barren of record support (see *e.g.*, p. 9 and pp. 64-65 *supra*) which are flatly contradicted by undisputed testimony or exhibits. Appellant blandly states "[a] single large independent bank is more likely to engage in vigorous competition if it is not one of those firms controlled by holding companies, which themselves are in similar competitive situations in many markets throughout the state." It cites earlier portions of its brief as its sole authority and begins the next sentence "therefore"!

D. Statewide "Concentration" Is Not Incompatible With Effective *Market* Competition.

Further, Appellant asserts that the net effect of permitting Bancorporation to acquire FNB Greeley would be to increase statewide concentration[87] and, as everyone knows, that is bad. Or is it? Statewide concentraton levels are at their lowest in states which permit little or no branching–averaging but 37% in the five largest organizations (App. 1670). It is highest in those states permitting statewide branching–85% in the five largest (App. 1669). On the thesis advanced at the beginning of this paragraph, the highly restricted branching states ought to have the more competitive environment. By one objective test, however, the converse is true. As this Court has observed, banking markets are essentially local. *United States v. Phillipsburg National Bank and Trust Co.*, 399 U.S. 350, 362 (1970). How do "highly concentrated" states compare with "low concentration" states in the number of competitive options available per market? All free-standing cities in the two groups of states in size categories 5-10,000; 10-15,000;

[87] There was absolutely no evidence introduced to support the proposition that the State of Colorado is a relevant market in which to assess the vigor of potential competition, nor does Appellant's brief offer any argument on the subject–beyond the assertion thereof (GB 54). We deny that the State is such a market but shall, nevertheless, refer to the theoretical statewide concentration levels as postulated by the Appellant.

Alhadeff in *Monopoly and Competition in Banking* had this to say about state concentration ratios: "Conventional concentration statistics in this field of banking are usually computed on a legalistic or political-jurisdictional base; hence, the common practice of showing concentration of banking resources on a statewide basis. Statistics computed in this manner may conceivably serve legalistic or political purposes. For economic analysis, such statistics are meaningless or worse." (p. 52 (1954)).

15-30,000 and 30-50,000[88] were tested for numbers of competitive options.

The universe encompassed more than 1,500 cities. They showed the following:

	Average Number of Banking Organizations Per City			
	5-10,000	10-15,000	15-30,000	30-50,000
(1) States with Unlimited Branching	2.21	2.90	3.46	3.83
(2) States permitting no branches or branches only in headquarters county or less	1.91	2.26	2.63	3.12
Percentages by which (1) exceeds (2)	15.7%	28.3%	31.6%	22.8%

(App. 1679).

Plainly, the number of competitive options in local markets is significantly greater in the "high concentration" states and justifies the conclusion that the higher the state (*i.e.*, non-market) "concentration" the greater the competitive options. We do not leap on this fact and

[88] Towns which are smaller than 5,000 tend to be natural monopolies; towns larger than 50,000 tend to encompass more than one market.

conclude triumphantly that an increase in statewide "concentration" in Colorado is therefore a competitive desideratum of the highest order, but we do suggest that it is at least a valid datum on Appellant's *ipse dixit* that increases in statewide "concentration" establish or presage substantial lessening of competition in particular markets.[89] Taken together with the testimony of Dr. Baxter that, as a whole, statewide banking systems tend

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[89] When a banking organization is forced to establish a branch or subsidiary supervisory department to direct a diverse geographic operation, and that department is competing with similar departments in other organizations, that competition tends to generate pressures for *de novo* entry in areas where acquisitions have occurred in order to broaden regional coverage. Consequently, the number of competing units per market grows. Appellant appears to believe that if one bars a major bank from *starting* a subsidiary or a branch system by acquisition, that organization will nonetheless assume the risks, the expense and the structural changes required to establish such a system *de novo*. Appellant has offered no evidence to support this thesis, has pointed to no organizations which have established statewide system by utilizing this route, and has offered no financial evidence why a business organization would or could be willing to assume the losses over long periods of years it would take to make such a course pay. Surely this evidentiary burden may not be disposed of so easily. What Appellant appears to be saying is that if the market structure of banking in a state can be improved by permitting the larger organizations to expand geographically via acquisition, would not it be even better to have that geographic expansion without acquisitions? There is no evidence that one would have meaningful expansion without significant acquisitions, but, more critically, if we are speaking of one competitive good outweighing another, how do we reach a substantial lessening of competition in either case? Are we not assessing the choices of a regulator and not proving a violation of a legal prohibition? If Appellant would structure an industry along an ideal formation, it ought persuade those charged with structuring that industry as to the desirability of its scheme or seek Congressional authority to substitute its judgment for theirs.

to offer a much higher order of competition than markets dominated by local interests (App. 391) and the testimony of the Regional Administrator of National Banks that FNB Denver is a competitive bank in a competitive market while FNB Greeley and Greeley generally do not meet that description (App. 331, 404), these considerations suggest that competition will be benefited by this affiliation.

After filing its proposal for acquisition of FNB Greeley, Bancorporation applied to the Federal Reserve Board for permission to acquire the First National Bank of Pueblo. On September 1, 1970, the Board rejected this application on competitive grounds (App. 1729), although the bank was not in actual competition with any Bancorporation subsidiary. Bancorporation then applied for acquisition of the Exchange National Bank of Colorado Springs. This was approved by the Board on April 1, 1971 (App. 1764). Appellant instituted suit to block the acquisition on April 28, 1971 under the Clayton Act.[90] The agreement was abandoned by the Exchange bank during the trial of this case and the suit was dismissed on August 22, 1971. An application by Bancorporation to acquire the Montbello State Bank was denied by the Board on January 4, 1971 on competitive grounds (App. 1753). Subsequently, the Administrator of National Banks rejected Bancorporation's proposed new charter in the Montbello area after protest on the ground that Montbello State was not strong enough to take the competition (App. 353). An application by Bancorporation to acquire The Security State Bank of Sterling was approved by the Board on November 3, 1970 (App.

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[90] *United States v. First National Bancorporation, Inc.*, Civ. No. C-3077, D. Colo.

1743). Appellant sued to enjoin this acquisition on December 2, 1970 under the Clayton Act.[91] This suit remains pending. An application pending during the trial of this action to acquire the financially troubled National State Bank of Boulder was consummated subsequent to the decision herein (1971 *Fed. Res. Bull.* 613). National State thus became the first bank ever acquired by Bancorporation.[92]

IV.

SECTION OF THE COUNTRY

Appellant contended below that the effect of this merger may be measured in two "relevant geographic markets," Greeley and a "Greeley area" (Complaint ¶ 17(a), App. 8) generally outlined in the Complaint. The district court accepted the second such market.[93] We believe that here the court below erred. There were six banks in Greeley and two in the "Greeley area" outside the city, at Eaton and La Salle, farming towns of less than 1,500 in population located about 5-8 miles north and south of Greeley, respectively.

This Court has previously addressed itself to the question of "Section of the Country" in actual com-

[91] *United States v. First National Bancorporation, Inc.*, Civ. No. C-2754, D. Colo.

[92] Appellant admits that even this single acquisition would have been blocked but for the extreme condition of the bank. "In the latter instance the government did not bring suit because the acquired bank was in serious financial difficulties." (GB 7, n. 9).

[93] The opinion of the district court suggests not that it rejected the first, Greeley, market, but rather that it considered its alternatives to be Weld County or the "Greeley Area" (329 F. Supp. at 1012-1014) and that it never reached the question whether Greeley was a market.

petition cases both in and out of banking. In *Phillipsburg*, Mr. Justice Brennan stated:

> In determining the relevant geographic market, we held in Philadelphia Bank, *supra*, at 357 . . . that "[t]he proper question to be asked . . . is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate . . . . This depends upon the 'geographic structure of supplier-customer relations.'" More specifically we stated that "the 'area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies.*'" [Court's elisions, Court's emphasis].
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> * * *
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> Commercial realities in the banking industry make clear that banks generally have a very localized business . . . .
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> * * *
>
> The localization of business typical of the banking industry is particularly pronounced where small customers are involved.[94]

In a potential competition case there is no "area of effective competition." Rather we must look to that area (1) in which the institution to be acquired is an effective competitor and (2) where alternatives are themselves effective competitors of the institution to be acquired. Thus, in the instant case, Appellant included in its second

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[94] *United States v. Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 362-363 (1970).

market area (the "Greeley area") communities at distances ranging from 5 to 10 miles from Greeley in Weld County, but excluded from its market area the "rest" of Weld County. However, 5 bank presidents from banks situate in the excluded portion of the county testified that the Greeley banks were "effective competitors" in their market area[95] and the evidence showed that the Greeley banks made about half of the loans in the excluded area (App. 421). It was Appellees' view that Greeley banks were "effective competitors" throughout Weld County. We would agree with Appellant, however, that the "rest" of Weld County is not a part of the relevant geographic area for measuring an acquisition of a Greeley bank by a banking organization not in actual competition with it. For although the Greeley banks–at the county seat, the only community in the county with a population of 2,500 or more–were "effective competitors" in other parts of the county, there was no evidence to show that banks in the excluded portion of Weld County were effective competitors of the Greeley banks. The fact that a reasonable portion of the people in Ault might be willing to choose a bank in the County Seat does not prove the converse that the citizens in the County Seat would be willing to choose to bank in Ault.

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[95] Weigand, R. 99-100; Coon, R. 103-5; Davis, R. 107-8; Ashley, R. 115; Burns, R. 118-9.

But by the same token, *Appellant* had the burden of establishing his "section or sections of the country." [96] Appellant made no effort to show that a bank located in Eaton or La Salle was an effective alternative to a customer located in Greeley. Appellant did not call or depose any official of either bank, nor did he obtain statistics from them as to their customers' place of residence. Having failed to take up its burden to demonstrate that an Eaton or La Salle bank was an "effective competitor" to whom a Greeley "purchaser can practicably turn for supplies,"[97] we submit that Appellant failed to establish his second "relevant geographic market," the "Greeley Area," and the district court erred in so finding. On the other hand, there was evidence introduced at the trial to show that at least two of the other Greeley banks had approximately the same customer geographic mix as did FNB Greeley (App. 303, R. 781). These principal Greeley banks may then fairly be said to be in effective competition with each other.

The appropriate geographic market within which to measure the acquisition of FNB Greeley by an organization not in direct competition with FNB Greeley is the City of Greeley. Should this Court determine that banks in any community effectively served by a Greeley bank

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[96] Judge Weinfeld in *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 583 (S.D. N.Y. 1958) stated: "In broad outline, the essential issues which the Court is called upon to determine, and *as to which the Government has the burden of proof*, are: the line or lines of commerce and the section or sections of the country in which the effects of the merger may be felt—in other words, the relevant market with respect to both products and geographic areas. . . ." (emphasis supplied).

[97] *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

are reasonable competitive alternatives (without evidence of their converse effectiveness) which ought be considered in assessing the impact of this affiliation, then the appropriate *second* "Section of the Country" or "relevant geographic market" ought be Weld County and not some portion thereof ascertained by measurements of imperceptible gradations.

V.

LINE OF COMMERCE

Appellant contends that "[i]t is agreed that . . . the relevant product market is . . . commercial banking" (GB 4). We do not know who has "agreed" to this proposition, but it is not the Appellees herein. Throughout this case, Appellees have consistently denied that "commercial banking" is *a* line of commerce much less *the* line of commerce (Answer, ¶ 5, App. 10, App. 423-429, Defendants' Trial Brief 67-83, Defendants' Post Trial Brief 4-6).[98] Appellant bore the burden of proving this question of fact.[99] He did not fail in this burden, he refused to essay it. Appellant contended that the conclusions of this Court in other cases on other factual records, proved this factual question for all time, in all cases. Appellant consequently refused to offer *any* evidence on the question.[100]

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[98] We append relevant portions of our Trial Brief below.

[99] See n. 96, *supra.*

[100] App. 423. On several occasions, government counsel argued in effect, under this Court's *Philadelphia* and *Phillipsburg* decisions, for a form of collateral estoppel against the offer by Appellees of any evidence to establish a different line or lines of commerce (App. 423, 497-498; R. 1298).

We believe that Appellant had the affirmative of establishing his market on this record and that on his failure to establish a fundamental predicate of his case, that case ought to fail. In accepting reference to other findings in other cases, we believe the district court was in error. We take it to be settled law that a plaintiff has the burden of establishing his alleged line of commerce. Appellees offered testimony (App. 423-429) briefs (see Appendix) and exhibits (App. 1794-1800) in support of a different line. Apparently confusing *stare decisis*, which makes opinions of this Court on questions of law binding on all courts, with *res judicata*, which also can bind the parties on questions of fact, Appellant rested on the findings of this Court in *Philadelphia Bank, supra, Nashville*[101] and *Phillipsburg, supra,* although five separate district courts,[102] including Chief Judge Clary on whose opinion this Court's *Philadelphia Bank* judgment was based, have subsequently made contrary findings.

We do not ask this Court to find as a fact what the appropriate line or lines of commerce may be in this case. Rather we contend that Appellant, having failed to establish an essential predicate of his case, ought have this appeal dismissed for failure of proof.

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[101] *United States v. Third National Bank in Nashville*, 390 U.S. 171 (1968).

[102] *United States v. Crocker-Anglo National Bank*, 277 F. Supp. 133 (N.D. Cal. 1967) (Judge Zirpoli), *United States v. First National Bank of Jackson*, 301 F. Supp. 1161 (S.D. Miss. 1969) (Judge Nixon), *United States v. First National Bank of Maryland*, 310 F. Supp. 157 (D. Md. 1970) (Judge Kaufman), *United States v. Idaho First National Bank*, 315 F. Supp. 261 (D. Idaho 1970) (Judge Boldt), and *United States v. Provident National Bank*, 280 F. Supp. 1 (E.D. Pa. 1968) (Chief Judge Clary).

VI.

APPELLANT'S VERTICAL CASE

The Federal Reserve Board spoke persuasively to Appellant's vertical integration arguments in its approval of the proposed affiliation of the Exchange National Bank of Colorado Springs with Bancorporation (abandoned, after suit):

> The Board has considered a comment by the Department of Justice, which concludes that the proposed acquisition would have a significantly adverse effect on competition on the grounds, among others, that consummation of the acquisition might eliminate a source of correspondent services for unaffiliated Colorado Springs banks. . . .
>
> As regards the possible loss of correspondent services, the argument appears to be premised on the theory that the affiliation of a Denver bank with a Colorado Springs bank will reduce the number of correspondents for the other banks in Colorado Springs, in part because these banks would be unwilling to entrust confidential or business data to an affiliate of a competitor. However, correspondent services vary in character and importance, and the majority could be equally well performed by banks outside the areas in which the Justice Department alleges anticompetitive effects. Banks in Colorado Springs and in the State have more "upstream correspondents" outside than within the State. Portfolio and management advice, loan participations, and miscellaneous specialized services could be furnished by these out-of-State correspondents. Check processing may be done by banks with computer facilities, at service bureaus or at the Federal Reserve in Denver; no confidential information is involved which might preclude a bank from seeking the services of an affiliate of a competitor.

Moreover, the argument relies, in part, at least, on the premise that Applicant's Denver subsidiary, a leading correspondent bank in the State, would be less desirable or less available as a correspondent for banks in the Colorado Springs area if it had an affiliate in that area. A difficulty with the argument is that it would appear applicable, if valid in any case, to any proposal through which the Denver bank would obtain a Colorado Springs affiliate, without particular regard to the size or market position of such affiliate. More broadly applied, it argues against permitting a large correspondent bank to become a subsidiary of a holding company, or in any other way expand into markets in which are located banks for which it serves, or could serve, as correspondent. The Board is not aware of any evidentiary basis for the premise on which the argument is based, and, in the absence of a demonstration that such expansion in fact, rather than in theory, leads to a curtailment in the availability of essential correspondent services, is unwilling to adopt that conclusion as a principal basis for curtailing expansion which is likely to result in better service to the communities affected.[103]

A. Appropriate Geographic and Product Markets

As indicated earlier, the backward vertical integration argument was abandoned before trial (p. 14, *supra*). The forward vertical integration aspect of Appellant's novel claim also suffers from several major debilities. First, a vertical integration case is cumulative. The evil, if evil there be, arises from the sum of what has gone before.

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[103] App. 1770-1771.

Thus if this affiliation ought be interdicted because of foreclosure, all subsequent affiliations having the same effect, *a fortiori*, ought be interdicted. Appellant has not considered itself constrained by the logic of its own position.[104]

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[104] Appellant contends that, taken together with the previous acquisitions (by others), the acquisition of FNB Greeley in reasonable probability would substantially lessen competition, presumably by reducing the pool of potential recipients of correspondent services offered by Bancorporation's competitors to an unacceptable level—the "drying up" argument. Appellees have no quarrel with this theory. However, while this suit was under active contemplation or subsequent to its filing, Appellant has permitted (or has indicated that it will permit) the acquisition of six other banks by United Banks of Colorado and Colorado National Bankshares, two holding companies whose prior acquisitions allegedly, in material part, formed the predicate for a violation in our initial acquisition. These new acquisitions were: Lakewood Colorado National Bank (by Colorado National Bankshares, 11/1/69), Villa National Bank (by United Banks of Colorado, 4/8/70), Mesa National Bank (by United, 12/21/70), Bank of Glenwood (by Colorado National, 3/18/71), First National Bank of Sterling (by Colorado National, 11/22/71), and Colorado Commercial Bank (by United, 1/21/72) (*Moody's Bank & Finance Manual*, 1972). These six banks had year-end 1970 combined deposits of $56 million (App. 1337-1370). Appellant justifies its choice by observing that these banks are *smaller* than FNB Greeley and therefore their acquisition is not as damaging as FNB Greeley's would be. Like most of the *ipse dixits* upon which this case is predicated, no proof is offered on a premise which offends simple reason. If a bank needs to turn to another for services, it is because it cannot economically perform them itself. For many services, the larger the bank, the smaller the need. If the loss of the business of FNB Greeley would substantially lessen competition among offerors of correspondent services, then the loss of the business of the six banks whose acquisition Appellant has approved similarly would substantially lessen competition to an even greater degree (since, using total deposits as a proxy, they are, combined, a more significant portion of the industry than is FNB Greeley—$56 million to $39 million).

Second, Appellant claims that FNB Greeley's acquisition would remove from the pool of potential Colorado recipients of correspondent services offered by the six enumerated banks a recipient (FNB Greeley) accounting for 1.2% of such services (JS 24).[105] This percentage was arrived at by doing extreme violence both to the numerator and to the denominator.

To limit our inquiry to six enumerated Denver banks (the denominator) we must conclude that "correspondent services" are sold in "packages" (yet, each Colorado bank reports an average of 5.4 correspondents (App. 1331-1336, 1396).[106] We must also conclude that other offerors of "correspondent services" are in some way artificially inhibited in their ability to compete against the six enumerated Denver banks for each of the "packaged services" (yet, the evidence showed that 15 organizations sold data processing services to banks in Colorado (App. 359); that the market for Federal Funds is a national one, with locational advantages in West Coast banks, and with California and New York taking the bulk of the business (App. 356-357); that municipal bonds are sold by brokerage houses to banks throughout the country (App. 357-358); that the market for credit card sales and service is a national one (App. 358); as are those

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[105] The district court did not, as Appellant suggests, "accept this figure arguendo" (GB 16, n. 19). The district court rejected the figure out of hand. The district court found that the appropriate section of the country was the 5-state area regularly traveled by the Denver banks, in which the affected commerce of FNB Greeley was two-tenths of one percent (329 F. Supp. at 1019 and n. 13).

[106] This figure understates actual correspondent relationships. Habitually, banks do not report all of their correspondents (App. 502).

for the sale of pension and profit plans and the purchase of overline loans (App. 354, 358-359); that the largest single offeror of check clearing services is the Federal Reserve Bank (App. 355)).

To further limit the denominator by excluding non-Colorado banks served by the "Denver Six" is to ignore that FNB Denver and its local competitors receive 35-40% of their gross correspondent balances (and probably a larger portion of net balances) from banks outside Colorado (App. 1301); that more than half their correspondent accounts come from outside the State of Colorado, in Kansas, Nebraska, Wyoming, New Mexico, and part of Montana, Idaho and Texas (App. 440). Appellant excludes from its denominator any Colorado bank which is an affiliate of one of the "Denver Six." Although Appellant assumes that such affiliations are already beyond competitive reach, they are, nonetheless, part of the universe of banks in the market asserted and must logically be part of our base. This assumption, moreover, however central to Appellant's underlying thesis, is erroneous. FNB Denver is a principal supplier of correspondent services to banks in Colorado which are subsidiaries of other holding companies having a subsidiary among the "Denver Six" (*e.g.*, Western Bancorporation and First Colorado Bankshares) (App. 346-349). FNB Greeley, now three years after the agreement to affiliate, still uses three of the "Denver Six" among its principal correspondents (App. 884).[107]

[107] Similarly, Colorado National Bankshares' Lakewood subsidiary has a correspondent relationship with Western's American National Bank in Denver. The Boulder subsidiary of United Banks of Colorado has a correspondent relationship with Central Bank and Trust in Denver, as do United's Pueblo and Grand Junction subsidiaries. Furthermore, the Englewood and Lakeside subsidiaries of First Colorado Bankshares have correspondent accounts with the lead bank of Colorado National Bankshares in Denver. (DX 16).

Moreover, the statistics are hopelessly compromised by he measuring rod—gross demand deposit accounts naintained by one bank at another. Most correspondent ervices, *e.g.*, data processing, purchase and sale of nunicipal bonds, credit cards, Federal Funds, commercial oans, and pension and profit sharing plans are paid for y fee or cash percentages on gross prices (App. 59-361). The only significant service which is tradition-lly (though by no means exclusively (App. 363-364)), aid for by deposit balances[108] is check clearing (*ibid.*). Gross balances are not a proper measurement of even this ype of correspondent service (App. 361-362, 440), as is pparent from the FNB Greeley account. (See App. 804, 364-365.) When bank A or the Federal Reserve ank clears bank B's checks for it, bank B is given a redit for deposits which have not yet cleared through he bank of origin. This is called "float," and of course eflects no income to the clearing bank (App. 364-365). f bank B maintains a $1.1 million demand deposit ccount with bank A (or taps its resources with the ederal Reserve Bank), only the difference between float" and gross balances represents usable balances for ank A against which it can charge its processing costs nd earn its profit. Thus FNB Greeley had an average alance of $1.1 million at FNB Denver in 1970, but had n average float of $800,000 (App. 364-365). It is only gainst the net balances ($300 thousand) that FNB enver could charge its costs and measure its profits *ibid.*). Thus, it is only with respect to *net* balances or to

[108] The balance is only a beginning figure. A monthly analysis f account profitability is run, and if the account is not profitable, bill is sent quarterly. A bank running consistently at a loss may ncrease its balances or continue paying in cash—FNB Denver is ndifferent (App. 363-364).

profits that we can measure that portion of the "Denver Six" business which would be "usurped" (*arguendo*) by the affiliation. Since we have no statistics in this record from which we can measure net balances, we are left to measure the impact of the proposal on net profits of the "Denver Six." Account analysis of the FNB Greeley account with FNB Denver in 1970 showed a net operating profit of $5,000 (or $2,500 after taxes) (App. 1804, 364-365). Net income of Bancorporation after taxes was $5.4 million (*Moody's Bank & Finance Directory, 1971*). Thus the contribution of the FNB Greeley account to the profitability of Bancorporation was five one-hundredths of one percent. The profit "foreclosure" among the "Denver Six" was one-one-hundredths of one percent.[109]

B. Competitive Impact

That the competitive effect of this proposed affiliation upon the offerors of correspondent services—even in Appellant's absurdly truncated geographic and product

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[109] 1970 net income and year-end deposits (in Colorado) of the "Denver Six" were as follows:

Holding Company	Net Income	Deposits (000)
United Banks	$ 5,532,621	$645,370
FN Bancorporation	5,411,800	589,633
Colorado National	2,465,393	315,040
Western Bancorporation*	72,846,636	221,547
Central Bank & Trust Company	2,023,172	236,938
First Colorado Bankshares	1,143,272	146,926

(*Moody's Bank & Finance Manual*, 1971; App. 1371).

*To find that portion of Western's earnings allocable to Colorado we assumed that it earned, relative to its Colorado competitors, in the same proportion that it had a deposit base in Colorado. This gave us a figure of $1,898,658 or total "Denver Six" Colorado earnings of $18,474,916.

markets—would be *de minimis* is demonstrable in a number of ways:

(1) it would foreclose (*arguendo*) one-one hundredth of one percent of the earnings of the affected institutions (App. 1804);

(2) FNB Denver has 1,452 employees, its correspondent business occupies part of the energies of 15 of them (App. 353).

In addition, despite the alleged foreclosure, two new offerors of correspondent services have entered the lists since this affiliation was announced (First Colorado Bankshares (App. 205) and ABC (App. 163)).

Finally, there has been no "drying up" of customers. To the contrary, in 1961, there were 159 potential bank customers for correspondent services in Colorado, with combined deposits of $1.1 billion. At year end 1970, there were 211, with combined deposits of $2.3 billion (App. 435-436, 1660, 1661).

The relevant "line of commerce" or "product market" is, in any case, "large bank services," not the *way* in which they are obtained. Correspondent banking is a method of securing the services of big city banks in smaller communities (App. 429). As a method, it competes with the methods of disseminating those same services entailed in branching or membership in holding companies.

Correspondent banking is, to the big city bank, a money making tool, as is branching and structuring holding companies. Their push in any of these directions must arise from their conclusion that that one is a more effective, efficient (*i.e.*, profitable) method of disseminating their services. We submit that the various methods of offering large bank services to smaller communities

should be permitted to compete freely—the more effective methodologies receiving the dominant share—the core of competition. Appellant's fears that the permanency of holding companies and branching relationships would drive out the correspondent relationships may be translated from the vertical case alleged to a typical horizontal concentration argument, to which portion of this brief the Court is respectfully referred.

CONCLUSION

Appellant's case is a simple one. The facts are not disputed. Bancorporation is one of the larger banking organizations in Colorado. It had no offices outside the immediate Denver area. FNB Greeley, the 1,385th largest bank in the United States, with 0.009 percent of total commercial bank deposits, is the second largest bank in Greeley. Appellant contends that the affiliation of FNB Greeley and Bancorporation would, therefore, in reasonable probability substantially lessen competition in Greeley.

The number of banking organizations in Colorado has been increasing sharply over the last ten years. The share of State deposits controlled by the 5 largest banking organizations has decreased. The parties are in agreement that a limited number of banks per community is a natural structure for banking. Greeley has more or as many banking organizations as 99%+ of communities in the United States which are of similar size. There is then no demonstrated need for additional entrants. But if no more entrants are needed, then the disappearance of a potential entrant, even if it were the only one, could not be a substantially anticompetitive event. There are, in Colorado, some 54 groups of entrepreneurs distinct from the larger holding companies who have organized new

banks in the past 10 years. The resources and the technical personnel associated with the organization of a new bank in Greeley are on an order of magnitude associated with the organization of the previously stated 54 banks. There is thus no *need* to have Bancorporation among this broad base of potential entrants. Potentiality, further, implies capacity and the evidence was persuasive that the regulatory agencies will not let further banking organizations into Greeley in the foreseeable future.

Even if the concentration of state deposits in the hands of the largest banking organizations was up instead of—as it is—down, the relevant consideration is competition in banking markets, which are local. National patterns show a marked advantage in the number of competitive options in the states with the highest statewide concentration over those with the lowest statewide concentration.

Specifically, FNB Greeley has been a largely ineffective bank as evidenced by its sharply declining share of Greeley deposits and an over-emphasis on a single class of customers. Bancorporation has offered a concrete program to reverse this trend and the evidence shows that its principal subsidiary is itself a hard competitor. If the evidence shows anything as to Greeley, it shows a prospect of *increased* competition resulting from the affiliation. Both bank supervisory agencies reviewing the proposal considered this to be a distinct plus in their consideration of the affiliation.

It is, of course, *possible* that Bancorporation might someday be moved to seek *de novo* entry into Greeley; it is also *possible* that market conditions will have so changed as to make the regulatory agencies amenable to such a request; it is *possible* that the scores of other potential entrants might, for one reason or another, have

passed from the scene; and it is *possible* that Greeley will, in the reasonably foreseeable future, grow so rapidly that a need for more than five banking organizations could arise and become so critical as to make the absence of a sixth potential entrant a substantially anti-competitive event. Very little is excluded from the realm of the possible.

If this Court is inclined to construe potential competition in banking within the ground rules previously laid down, then Appellees respectfully suggest that the undisputed facts here fall so far outside those boundaries that this appeal ought be dismissed out of hand. Even if the Court should be inclined to explore new frontiers of the law, we believe that the wholly negative contours of this case are entirely inappropriate to that purpose. If an acquisition is to be struck down when there is no competition affected, no reasonable likelihood or need for developing new competition, no trends towards an undesirable concentration and a fair prospect of an improved competitive structure, what inhibitions can there be on a wholly arbitrary discretion in Appellant—a carte blanche across the broad spectrum of industry? No such Congressional purpose is discernible in the legislative history or the judicial interpretations of the Clayton Act. For these reasons we urge the Court to affirm the judgment of the Court below.

Respectfully submitted,

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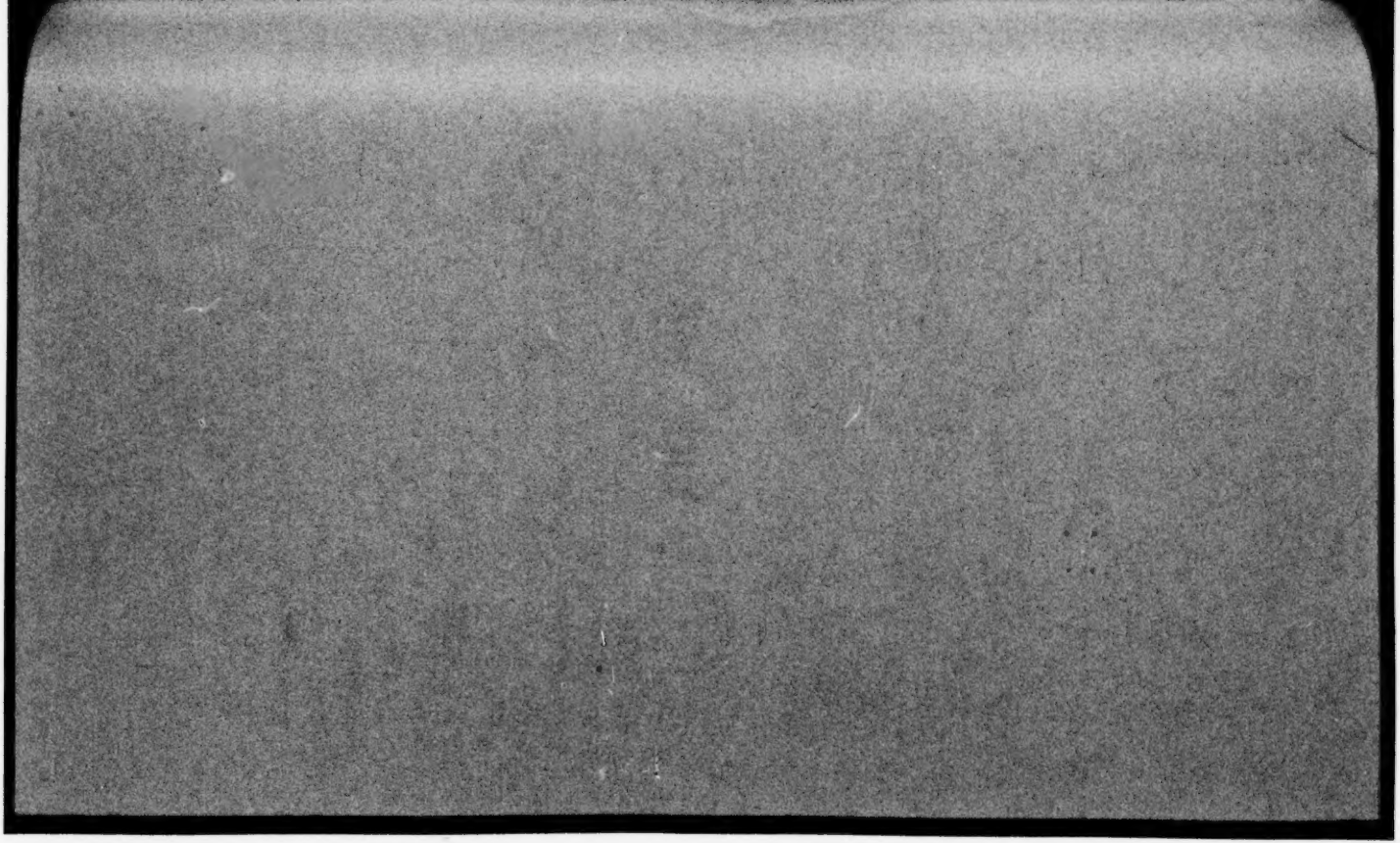
APPENDIX



APPENDIX*

Line of Commerce

Only commercial banks offer demand deposits. Other passbook savings institutions offer savings accounts (Savings & Loans, Credit Unions, Mutual Savings Banks, Industrial Banks, etc.). Other institutions offer mortgages (insurance companies, S & L's, federal agencies, individuals, etc.); installment loans (credit unions, finance companies, business organizations, credit card companies, etc.), and the like . . .

. . . Plainly, commercial banks compete with S & L's, credit unions and the like for the savings dollar. Equally, commercial banks compete with, e.g., data processing centers and mutual funds as a service organization and with finance companies, credit unions, insurance companies, etc., as a source of lendable funds. The transfer [demand deposit] function is, we concede, relatively unique and warrants treatment as a separate line of commerce. But only in this single respect may we examine the competitive effects of a proposed bank merger in isolation from other financial institutions. The effect of the proposed merger on the nature, kind and quality of competition in transferring funds is all we concede is insulated. If examination proves this kind of activity to be relatively non-competitive, relatively immune to effects of change in the number of suppliers, then the effects of the merger *in that line of commerce* must be measured by different standards than would govern something more volatile like the market for savings dollars. There, of course, the universe (the total number of competitors) is much larger than commercial banks alone and the effect of the merger must be measured in that greater context.

*Pages 67, *et seq.*, of the Trial Brief of Appellees herein.

Plaintiff places much reliance upon the unique congeries of services offered by commercial banks. We deny the relevance of any representation that no other financial institution duplicates the precise combination of services offered by commercial banks. In the science of semantics, words are meant to differentiate, to particularize concepts. If another kind of financial institution offered the same congeries of services as does a commercial bank it would not be another kind of financial institution, it would be a commercial bank. By the same token, a commercial bank is not a life insurance company because it offers a different combination of services–it is something else. But that the combinations are different does not mean that the different financial institutions do not compete in particular functions. A credit union competes with, *inter alia,* commercial banks for savings dollars and for consumer loans. This is a truth. This truth is not lessened in any way by the fact that a credit union is not a medium for the transfer of funds nor, usually, a data processing service organization. But the Clayton Act was not directed toward *combinations* of services. What *combinations* are duplicated or unduplicated are irrelevant. The Clayton Act concerns itself with *competition.* The issues of this suit relate to whether banks *compete* with other institutions in the offering of services, service by service, and line of commerce by line of commerce.[110]

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[110] Note, for example, the language of the Supreme Court in *United States v. Continental Can Company,* 378 U.S. 441 (1964).

> It is quite true that glass and metal containers have different characteristics which may disqualify one or the other, at least in their present form, from this or that particular use. The competition between metal and glass containers is different from the competition between the can companies themselves or between the products of the different glass companies.

Defendants deny that "Commercial Banking" is *the* relevant line of commerce in this case because we contend that "Commercial Banking" is not *a* line of commerce. A line of commerce, we take to mean a kind of business activity in which the products or services are functionally interchangeable–i.e., can be used for the same purpose, in which purchasers are willing to substitute one for another. "If price changes of one product affect the sales of another, such responsiveness is indicative of the competition of the products" (*United States v. Charles Pfizer & Co.*, 246 F. Supp. 464, 468 (1965). Is there "cross-elasticity of demand between products," in the words of the Supreme Court (*United States v. E.I. duPont Nemours & Co.*, 351 U.S. 377, 1956–The *Cellophane* Case). As the Court pointed out in that case, plaintiff bears the burden of establishing its product market, a factual conclusion which is established neither by an *ipse dixit* in the Complaint nor by reference to fact

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These are relevant and important considerations but they are not sufficient to obscure the competitive relationships which this record so compellingly reveals.

Regardless of which industry may have the upper hand at a given moment, however, an intense competitive battle is being waged both by the industry trade associations and by individual container manufacturers. In the light of this record and these findings, we think the District Court employed an unduly narrow construction of the "Competition" protected by § 7 and of "reasonable interchangeability of use or the cross-elasticity of demand" in judging the facts of this case. *We reject the opinion below insofar as it holds that these terms as used in the statute or in Brown Shoe were intended to limit the competition protected by § 7 to competition between identical products. Where the area of effective competition cuts across industry lines, so must the relevant line of commerce; otherwise an adequate determination of the merger's true impact cannot be made.* (emphasis supplied).

findings in other cases. Commercial banking is not a product or a service, it is a combination of products and services, each of which forms portions of disparate lines of commerce. The competitive effect of this merger must be tested by plaintiff in each such market and violation alleged as to that line or those lines where competition is or would be substantially lessened. It is a bootstrap operation pure and simple to say that commercial banking is unique and therefore any normal business activity–say, lending–engaged in by commercial banks is insulated from competition with other lenders.

Obviously, there are a great number of alternative outlets for demand for consumer and commercial finance business; e.g., in the City of Greeley there are two savings and loans, an office of the Production Credit Association, the Federal Land Bank, finance companies, International Harvester's credit arm, General Motors Acceptance Corporation, Ford Motor Company credit plans, and several credit unions.

Plaintiff relies exclusively on this issue upon the *Philadelphia National Bank*[111] case which was followed in *Nashville*[112] where the *District Courts* had found commercial banking to be the appropriate "line of commerce" and in which finding the Supreme Court concurred, and in *Phillipsburg*[113] when the District Court had refused to follow *Philadelphia*. The validity of the conclusion reached on this question in these cases

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[111] *United States v. Philadelphia National Bank, et al.*, 374 U.S. 361 (1964).

[112] *United States v. Third National Bank in Nashville, et al.*, 390 U.S. 171 (1968).

[113] *United States v. Phillipsburg National Bank, et al.*, 399 U.S. (1970).

nust be viewed in light of the fact that Chief Judge Clary of the Eastern District of Pennsylvania, who had made the initial ruling that commercial banking was a "line of commerce" in *Philadelphia*[114] took precisely the opposite view on a more complete record in *Provident*.[115]

In all, subsequent to the selection by the Supreme Court of "commercial banking" as a line of commerce in the *Philadelphia National Bank* case, six separate and distinguished courts have rejected this factual conclusion.[116] Indeed, Mr. Justice Brennan's proposition, that such advantages as he judged inhered in the demand deposit immunized the otherwise non-exclusive business activities of commercial banks from effective competition, had little support in the record before him. His citation to the record in support of this conclusion was to the testimony of W. Carlton Harris, a Wharton School Professor of Finance who testified:

> We have had in Philadelphia for 50 years or more the mutual savings banks offering ½ per cent and in some instances more than ½ per cent higher interest than the commercial banks. Nevertheless, the rate of

[114] 201 F. Supp. 348, 361 (E.D. Pa., 1962).

[115] *United States v. Provident National Bank*, 280 F. Supp. 1 (E.D. Pa., 1968).

[116] The three-judge court in *United States v. Crocker-Anglo National Bank*, 277 F. Supp. 133 (N.D. Calif., 1967), Chief Judge Clary in *United States v. Provident National Bank*, 280 F. Supp. 1 (E.D. Penn., 1968), Judge Nixon in *United States v. First National Bank of Jackson*, 310 F. Supp. 1161 (S.D. Miss., June 27, 1969), Judge Shaw in *United States v. Phillipsburg National Bank & Trust Co., et al.*, 306 F. Supp. 645 (D. N.J., 1969), Judge Kaufman in *United States v. First National Bank of Maryland*, 310 F. Supp. 157, D. Md. 1970 (D. Md., January 13, 1970) and, judged most recently, Judge Boldt in *United States v. Idaho First National Bank*, 315 F. Supp. (D. Idaho, 1970).

increase in savings accounts in commercial banks *has kept pace with and in many of the banks exceeded the rate of increase of the mutual banks* paying 3½ per cent. . . .

I have made some inquiries. There are four banks on the corner of Broad and Chestnut. Three of them are commercial banks all offering 3 per cent, and one is a mutual savings bank offering 3½. As far as I have been able to discover, there isn't anybody in Philadelphia who will take the trouble to walk across Broad Street to get ½ of 1 per cent more interest. If you ask me why, I will say I do not know. Habit, custom, personal relationships, convenience, doing all your banking under one roof appear to be factors superior to changes in the interest rate level. *United States v. Philadelphia National Bank*, 347 U.S. 321, n. 34 (1963).

This analysis is demonstrably false, and, we submit, the conclusion of the Court must be read in light of the facts that exist in the real world but which, for some reason, were never put into the record of the *Philadelphia* case.

Let us consider the *objective* facts regarding the deposit structure of commercial banks in that very market when compared to their savings competitors. Between 1950 and 1964 the savings deposits of Philadelphia SMSA commercial banks rose 765 million dollars. At the same time, the savings deposits of Philadelphia mutual savings banks rose 1,271 million dollars and Philadelphia savings and loan institutions in the shorter period 1952 to 1964 grew 1,631 million dollars. Thus, competitive institutions' savings dollars grew at *four times* the rate of commercial banks despite the fact that the number of points served by commercial banking offices has always substantially exceeded the number of

nts served by S & L's and MSB's.[117] This disastrous tive performance of commercial banks is not con- ent with the understanding of Professor Harris, and uires that the conclusion of Mr. Justice Brennan be valuated on a more complete record.

The contrary conclusion of subsequent courts sidering the question is lent dramatic support by the lit squeeze of 1966. In that year, changes in Regu- on Q[118] permitted commercial banks to equal and eed the interest rates available from mutual savings ks and savings and loan institutions. The impact of se changes on deposits of the latter group was strophic. With long term fixed interest obligations a high deposit-loan ratio, the very existence of the ustry was imperiled. Even with a return to stability in

[117] On June 29, 1968, there were 69 Mutual Savings Bank es, 323 savings and loan offices and 613 commercial banking es in the Philadelphia SMSA. Source: FDIC and FHLBB ey of Deposits and Offices of even date.

[118] The Federal Reserve Board regulation governing interest which may be paid by commercial banks on time money. l December 6, 1965, commercial banks could pay no more 4% on passbook savings and 4½ on certain types of time ey. On that date, banks were permitted to pay 5½% on all time s other than passbook. This compared favorably with the imum savings and loan rate of 5¼ and soon resulted in tantial deposit losses by the savings and loan institutions. To ve the situation, the Federal Reserve Board, on July 20, 1966 ced the commercial bank maximum rate on open maturity uments to 5%, retaining the 5½% only on fixed maturity time uments. The device was ineffectual and on September 26, , the Fed was forced to reduce the rate on single maturity instruments smaller than $100,000 to 5%. At the same time, Federal Home Loan Bank Board authorized the S & L industry sue a competitive time instrument to the certificate of deposit d by commercial banks. The crisis subsided.

the Fall of 1966, savings and loan institutions net inflow in the Philadelphia SMSA was down 90% in 1966 from 1965 (193 million to 18 million) and mutual inflow was down 80% (195 million to 34). It was the experience of the industry that a small change in the "price" of one "product" brought about a substantial shift from another product–a "cross-elasticity of demand" confirmed when a return to the old "price" produced a similar shift back to the first "product" (1967 net inflows equalled or exceeded 1965). This is precisely the formula established by the Supreme Court for determining a relevant product market in antitrust cases. Consider the following language:

> An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; *that the products compete in the same market.* (Emphasis supplied.) *United States v. E.I. dePont de Nemours & Co.*, 351 U.S. 377, 400 (1956).

While a substantial argument can be made that commercial banks compete with *all* media of discretionary personal investments–stocks, mutual funds, whole life, single payment and fixed payment life insurance and the like–we will consider here only the competition between commercial banks, mutual savings banks, savings and loans and credit unions, what the Statistical Abstract of the United States calls "Interest Bearing Deposits."

For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand are small.'

Times - Picayune Publishing Co. v. United States, 345 U.S. 594, 612, n. 31 (1953).

That the relevant "line of commerce" is at least this oad is strikingly demonstrated by the following tables. will be noted that in the nation as a whole, and in iladelphia in particular, the share of total deposits held commercial banks *declined* during the precise period en the *Philadelphia* Court was concluding that com-rcial banks were relatively immune to the competition other savings institutions. And the reversal of that nd came only when commercial banks adopted the tificate of deposit in the mid-1960's as a competitive trument to combat the previously higher interest rates ng paid by the other institutions.

DEPOSITS IN U.S. COMMERCIAL BANKS AND OTHER PASSBOOK SAVINGS INSTITUTIONS, SELECTED YEARS, 1940 - 1969
(In Millions of Dollars)

	1940	1945	1950	1955	1960	1965	1969
Commercial Banks	65,750	151,176	156,100	193,200	230,500	333,800	440,000
Mutual Savings Banks	10,660	15,385	20,025	28,182	36,343	52,443	67,086
Savings and Loans Associations	4,322	7,365	13,992	32,142	62,142	110,385	135,489
Credit Unions	212	367	884	2,447	4,981	9,221	13,680
Total Deposits	80,944	174,293	191,001	255,971	333,966	505,849	656,255
Commercial Banks (%)	81.22%	86.73%	81.73%	75.48%	69.02%	65.99%	67.05%
100 Largest Commercial Banks	37,637	72,538	71,690	90,498	109,024	160,783	229,359
100 Largest Commercial Banks (%)	46.49%	41.61%	37.53%	35.35%	32.64%	31.78%	34.95%

Source: Tables 651 and 670, United States Statistical Abstract, 1970. (Individual listed sources for data prior to 1950.)
American Banker, shares of 100 largest commercial banks.

NEW SAVINGS, WITHDRAWALS, AND NET INFLOW FOR FSLIC–INSURED S & LA'S IN PHILADELPHIA SMSA, YEARS 1953 - 1968
(in thousands of dollars)

Year	New Savings Received	Withdrawals	Net Inflow
1968	$894,667	$748,310	$146,357
1967	963,458	765,521	197,937
1966	745,822	727,821	18,001
1965	751,582	558,146	193,436
1964	673,046	500,353	172,693
1963	616,614	460,782	155,832
1962	591,490	435,483	156,007
1961	565,900	381,022	184,878
1960	497,370	355,763	141,607
1959	452,802	326,726	126,076
1958	396,894	296,100	127,794
1957	339,979	256,283	83,696
1956	327,640	224,385	103,255
1955	299,813	192,899	106,914
1954	267,066	156,009	111,057
1953	220,154	136,815	83,339

Source: Date Management Division
Federal Home Loan Bank Board

Where, for example, the geographic market for the demand deposit is found to be tightly strictured in a narrow area around the particular banking house, it cannot be redefined by pointing up a broader geographic market for some other service–say agricultural lending–which is a separate line of commerce with a separate conglomeration of competitors in a different geographic area of coverage.

The matter becomes critical where the demand deposit geographic market for one bank is quite plainly outside the demand deposit geographic markets associated with the other's nearest offices, that is: they are not in substantial competition for demand deposit accounts. Particular product markets, e.g., savings, have a reasonably interchangeable body of competitors which include S & L's and credit unions. The geographic market, the "area of effective competition," must be determined by examining distributive patterns of these other institutions as well as commercial banks.